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Supreme Court of the United States

October Term 1969

No. ~~11~~ 7

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

On Appeal From The United States District Court
For The Southern District of New York

BRIEF FOR THE APPELLANTS ON REARGUMENT

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August 9, 1969

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SUPREME COURT OF THE UNITED STATES

October Term, 1969
No. 11

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

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On Appeal From The United States District Court
For The Southern District of New York

BRIEF FOR THE APPELLANTS ON REARGUMENT

Opinion Below

The opinion of the three-judge statutory court (A. 63a)[1] is reported at 288 F. Supp. 348.

Jurisdiction

The judgment of the three-judge statutory court was entered on June 27, 1968. An appeal was filed on July 15, 1968. The appeal was docketed on September 27, 1968, and probable jurisdiction was noted on December 9, 1968. The jurisdiction of this Court rests on 28 U.S.C. §1253.

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1. "A" refers to the Appendix, 40 copies of which have been filed in this Court.

Statutes Involved

The State statutes involved are former §§160, 161, 163 and 580(1) of the Penal Law of New York, and former §596(3) of the Judiciary Law of New York, *infra*, 37-39.

The Federal statutes involved are 18 U.S.C. §2385 (Smith Act), 42 U.S.C. §1983, and 28 U.S.C. §2283, *infra*, 39-40.

Questions Presented

(1) Are former §§160, 161, 163 and 580(1) of the Penal Law of New York, forbidding the advocacy of the violent overthrow of organized government, unconstitutionally vague and overbroad both on their face and as applied by the New York courts?

(2) Does 28 U.S.C. §2283 or any other principle of law require this Court to abstain from granting injunctive or other relief?

(3) Does former §596(3) of the Judiciary Law of New York, establishing a monetary qualification for grand jury service, violate the Fourteenth Amendment?

(4) Does federal legislation in the field of sedition preempt New York State from enacting a statute which purports to forbid advocacy of the overthrow of the Government of New York State?

Statement of the Case

Plaintiffs are residents of the City and State of New York. On or about June 12, 1967, an indictment was filed in the Supreme Court, County of Queens, charging them with having violated New York's Criminal Anarchy Law, former §§160, 161, 163 and 580(1) of the Penal Law of New York.[2] They

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2 The Penal Law was amended effective September 1, 1967. Criminal Anarchy is now covered by Sec. 240.15 of the new Penal Law which reads as follows: "A person is guilty of criminal anarchy when (a) he advocates the overthrow of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow."

were also charged in other counts with the illegal possession of weapons. At the same time a separate indictment (No. 1223-67) not involved herein was returned against plaintiffs Ferguson and Harris, charging them with conspiracy to murder. These indictments led to a large number of press releases and news stories which not only linked all of the plaintiffs to the indictment charging conspiracy to murder but also set forth in some detail the alleged activities and aims of the individual plaintiffs. (A sample of these stories is attached to plaintiffs' moving papers and form part of the record in this case.)

On January 10, 1968 demurrers to the indictment involved in the instant case were sustained and the indictment dismissed on the ground *inter alia* that it failed to specify what government was the object of the alleged conspiracy and that it failed to allege the requisite intent. *People* v. *Ferguson*, 55 Misc. 2d 823, 286 N.Y.S. 2d 748 (Supreme Court, Queens County, 1968).

A week later, a superseding indictment (No. 134-68) was filed against the plaintiffs, again charging each of them with advocating criminal anarchy, and with conspiring to commit criminal anarchy, but this time alleging intent that the "acts be presently attempted and accomplished" (A. 10a, 11a, 12a, 14a) and stating the object of the conspiracy to be the overthrow of the government of New York. In addition, the plaintiffs, other than Stanford, Stewart and West, were charged with conspiracy to commit arson; Stewart and Samuels were charged with permitting their premises to be used for an assemblage of anarchists; and all of the plaintiffs except Stanford and West were charged with the unlawful possession of weapons. Thus, all of the plaintiffs were charged with some substantive crime aside from criminal anarchy except Stanford and West.[3]

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3. Harriet Noel, one of the defendants in the State Court indictment who is not a party to this proceeding, was likewise charged only with violating the criminal anarchy sections.

On March 12, 1968, plaintiffs, relying upon 42 U.S.C. §1983, filed a complaint in the Southern District of New York, alleging that the Criminal Anarchy Law was void on its face and as applied to them in that it violated the First, Fifth and Fourteenth Amendment guarantees of free speech, press and assembly (A. 5a), and that the statute was vague and indefinite in violation of the guarantee of due process of law (A. 5a).

In addition, the complaint alleged (A. 5a), that the Criminal Anarchy Law was unconstitutional since it had been superseded by 18 U.S.C. §2385 (the Smith Act). The complaint also alleged (A. 6a) that former §596(3) of the Judiciary Law, governing the selection of grand jurors, violated the Fourteenth Amendment by requiring a $250.00 monetary qualification for grand jury service.

The plaintiffs asked for a declaratory judgment that former §§160, 161, 163 and 580(1) of the Penal Law of New York and former §596(3) of the Judiciary Law are null and void (A. 7a), and that a preliminary and a permanent injunction issue restraining the defendants from enforcing these sections against the plaintiffs (A. 7a). The convening of a three-judge court was requested, pursuant to 28 U.S.C. §§2281 and 2284 (A. 6a).

The matter was referred to a three-judge court. The defendants filed answers (A. 48a, 49a) following which the plaintiffs moved for summary judgment (A. 50a). On June 26, 1968, the three-judge court, relying mainly upon *People* v. *Epton*, 19 N.Y. 2d 496, 281 N.Y.S. 2d 9 (1968) *cert. denied and appeal dismissed* 390 U.S. 29, dismissed the complaint, holding that the sections of the Penal Law under attack were constitutional and had not been superseded by the Smith Act (A. 69a, 70a). In addition, the court, relying upon an affidavit

submitted by the defendants stating that no one had been rejected for grand jury service solely because he did not have $250., upheld the validity of former §596(3) of the Penal Law (A. 75a). This appeal followed.

The District Attorney of Queens has consented to the entry of an order staying him from prosecuting the plaintiffs pending disposition of this case.[4]

Summary of Argument

I. A. The New York Criminal Anarchy statute, enacted in 1902, was first construed by the New York Court of Appeals in 1922 in *People* v. *Gitlow*, 234 N.Y. 132, *aff'd Gitlow* v. *New York*, 268 U.S. 652. Although the statute as thus construed is admittedly unconstitutional in the light of more recent decisions of this Court, *Dennis* v. *United States*, 341 U.S. 494, *Keyishian* v. *Board of Regents*, 385 U.S. 589, it was resurrected in 1964 to convict William Epton, *People* v. *Epton*, *supra*. The Court of Appeals in *Epton* sought to reconstrue the statute to meet current standards; that re-interpretation of the statute in *Epton*, accepted by the court below, still suffers from the vices of vagueness and overbreadth and the statute remains unconstitutional. The clear and present danger test, as construed by the Court of Appeals, does not even meet the standards of *Dennis* v. *United States*, *supra*. Furthermore, that test is itself of doubtful validity in view of recent decisions of this Court.

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4. The indictment in the Supreme Court, County of Queens was returned against 15 people. Ten of them are plaintiffs in the present action. A similar action was started in the Eastern District of New York by Fred Fernandez, one of the other persons named in the indictment. That action was subsequently transferred to the Southern District of New York and consolidated with this action. A separate jurisdictional statement was filed in this Court on behalf of Fred Fernandez. This Court noted probable jurisdiction and ordered that the case be consolidated with this one.

Realistically viewed, the conduct charged in the indictment could not possibly result in a real and imminent threat to the stability of our government. An indictment such as this necessarily inhibits and chills the exercise of First Amendment rights.

B. There is no reason, in this situation, for the Court to apply the doctrine of abstention. See *Baggett* v. *Bullitt*, 377 U.S. 360, *Harman* v. *Forssenius*, 380 U.S. 528. In *Dombrowski* v. *Pfister*, 380 U.S. 479, this Court held abstention inappropriate where statutes are attacked on their face as violating free speech. Hence in this case an injunction, *Dombrowski* v. *Pfister, supra*, and declaratory relief should be granted, *Zwickler* v. *Koota*, 389 U.S. 241.

Nor is abstention required by 28 U.S.C. §2283. In the first place, that section does not bar declaratory relief. *Zwickler* v. *Koota, supra*. Furthermore, consideration of the history of 28 U.S.C. §2283 and 42 U.S.C. §1983, the interpretation given to them by the courts, and the considerations underlying *Dombrowski* lead to the view that §1983 is an exception to the rule of comity set forth in §2283.

II. The re-interpretation of the New York Criminal Anarchy Statute by the Court of Appeals in *Epton* and accepted by the court below, violates due process by not affording plaintiffs fair warning of the new construction. The holdings of *Dennis* v. *United States, supra*, and *Keyishian* v. *Board of Regents, supra*, together with the non-enforcement of the law for over forty years justifiably led the plaintiffs to assume that the law was unconstitutional. To charge them with criminal conduct, which up to the time of the *Epton* opinion was prohibited only by an unconstitutional statute, violates the very essence of due process and operates as an *ex post facto* law. See *Bouie* v. *City of Columbia*, 378 U.S. 347.

III. The $250.00 monetary qualification for grand jury service violates the Equal Protection Clause of the Fourteenth Amendment. The decision of this Court, in condemning the poll tax in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, is equally applicable here, for poverty or affluence bear no relationship to competency to serve as a grand juror.

IV. Congressional legislation in the field of sedition establishes a Congressional intent to occupy the field, Smith Act, 18 U.S.C. §2385, Internal Security Act of 1950, 50 U.S.C. §781, *et seq.*, leaving no room for the state sedition laws. *Pennsylvania* v. *Nelson*, 350 U.S. 497, recognized that such legislation made no distinction between sedition directed toward overthrow of the federal government and similar activity directed toward the overthrow of state governments. The federal government has the primary responsibility of protecting the country against all seditious activity including that directed against the states themselves.

Preemption of state sedition statutes does not leave states powerless to protect themselves for they have innumerable statutes under which to prosecute threatened acts of violence.

ARGUMENT

POINT I

The New York Criminal Anarchy Law Violates the First and Fourteenth Amendments of the United States Constitution.

A. The New York Statute is both vague and overbroad.

Over the past half century, this Court has considered and struck down a series of State statutes found to be inconsistent with First and Fourteenth Amendment rights of free speech, press and assembly. *Stromberg* v. *California*, 283 U.S. 359;

Herndon v. *Lowry*, 301 U.S. 242; *Thornhill* v. *Alabama*, 310 U.S. 88; *Winters* v. *New York*, 333 U.S. 507; *Speiser* v. *Randall*, 357 U.S. 513; *Smith* v. *California*, 361 U.S. 147; *N.A.A.C.P.* v. *Button*, 371 U.S. 415; *Baggett* v. *Bullitt*, 377 U.S. 360; *Dombrowski* v. *Pfister*, 380 U.S. 479; *Keyishian* v. *Board of Regents*, 385 U.S. 589; *Brandenburg* v. *Ohio*, ___ U.S. ___, 37 U.S.L. Week 4525 (June 10, 1969) and many others. This Court has found statutory language in some of these cases to be so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Baggett* v. *Bullitt*, *supra* at 367; *Connally* v. *General Construction Co.*, 269 U.S. 385; *Lanzetta* v. *New Jersey*, 306 U.S. 451. In other cases, statutes have been found to be unconstitutionally "overbroad" in that their net is "large enough to catch all possible offenders" leaving it to the courts "to step inside and say who could be rightfully detained and who should be set at large." *United States* v. *Reese*, 92 U.S. 214, 221; see *Thornhill* v. *Alabama*, *supra*; *N.A.A.C.P.* v. *Button*, *supra*. *Cf. Aptheker* v. *Secretary of State*, 378 U.S. 500. Often it is difficult and perhaps unnecessary to classify statutes in one or the other category. Harlan, J., concurring in *Zwickler* v. *Koota*, *supra* at 257. See Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67. Terminology aside, this Court has been quick, especially in recent years, to hold State statutes to high standards of constitutionality out of a recognition that our democracy can survive only if our citizens may engage in the fullest and most vigorous expression of views about public issues. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270; *N.A.A.C.P.* v. *Button*, *supra* at 429.

The instant case presents a somewhat unusual situation. The statute under attack is an old one, having been enacted in 1902 following President McKinley's assassination. It lay dormant until World War I, when it was utilized to convict radicals

of that time. *People* v. *Gitlow*, *supra*. It was then moribund for another 40 years. In 1964 it was resurrected to prosecute William Epton, a radical of our time. *People* v. *Epton*, *supra*. The present prosecution followed hard on the heels of the New York Court of Appeals' affirmance of the *Epton* conviction, an affirmance based on a rewriting of the statute in a judicial attempt to conform to more recent constitutional standards laid down by this Court.[5]

In view of this history of the statute, it can hardly be argued that its meaning and scope are clear. The very same words of the statute have been now given two interpretations, the first, in 1922, being admittedly unconstitutional under current constitutional standards, and the second allegedly consistent with the decision of this Court in *Dennis*. See *People* v. *Epton*, *supra* at 505; *People* v. *Ferguson*, *supra* at 830.

A reading of the statute makes the difficulties clear. First, not a word in the statute (§§160, 161) suggests the requirement, recognized at least since *Dennis*, that there must be a specific intent to overthrow the government and that the mere teaching of the doctrine or even its advocacy is not sufficient in the absence of such an intent. *Cf. Yates* v. *United States*, 354 U.S. 298. Second, the statute says not a word about the requirement that a conviction for criminal anarchy can not lie, consistent with the Constitution, without a finding that the conduct of the defendants has created the danger of an evil which is "extremely serious" and with a "degree of imminence extremely high," *Bridges* v. *California*, 314 U.S. 252, 263, so that the civil authorities must act to prevent attempt

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5. The Epton decision was handed down on May 16, 1967. The indictment herein alleged that the acts of criminal anarchy occurred between October 1, 1965 and June 21, 1967, substantially all prior to the decision in *Epton*.

at the overthrow of the government. Third, the statute speaks in terms of "organized government" without distinction between local, State and Federal governments.[6]

The New York Court of Appeals in *Epton* attempted to fill these gaps in the statute, evidently acting on the theory, later enunciated by the court below in this case, that it could rewrite the statute in 1967 according to the presumed intent of the New York State Legislature 65 years earlier because "if the 1902 Legislature had known it could not have all it wanted, it would have wanted all it could get" (A. 69a). This free-wheeling principle of statutory construction, implicit in *Epton*, *supra* at 505, and explicit in the decision of the court below, is totally at variance with well-established doctrine of this Court. If a state court could re-interpret a criminal statute any way it pleased in accordance with a fictitious assumption as to the meaning of the State Legislature, this Court would never be justified in enjoining state court action. *Cf. Baggett* v. *Bullitt*, *supra* and *Dombrowski* v. *Pfister*, *supra*. This will be discussed more fully in Point II, *infra*.

Acting on this improper premise, the New York court "reconstrued" the statute by writing into it (a) a requirement of specific intent, (b) a requirement of "clear and present danger" and (c) a limitation of its terms to sedition directed against the State.

Aside from serious due process objections to such a procedure (see Point II, *infra*), the statute, even as differently construed on this second occasion, violates the Fourteenth Amendment.

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6. Reference to the broad term "organized government" is also objectionable because it is inconsistent with the decision of this Court in *Pennsylvania* v. *Nelson*, 350 U.S. 497. That aspect of the unconstitutionality of the New York statute will be considered below in Point IV. Argument is made here, in addition, that the language is unconstitutional because it is too broad.

The Court of Appeals' new construction provides little improvement over its construction in *Gitlow*. It now construes the statute to incorporate the "clear and present danger" test. But clear and present danger of what? This Court in *Dennis* meant a "'clear and present danger' of attempting or accomplishing the prohibited crime," 341 U.S. at 505; in this case, overthrow of the government. But as construed and applied by the Court of Appeals in *Epton*, a conviction under the New York statute does *not* require a clear and present danger of the overthrow, or attempted overthrow of organized government. While referring, in passing, to the *Dennis* standard, the court held that standard to be met by a finding of clear and present danger "that . . . riots . . . would be intensified or . . . rekindled." *People* v. *Epton*, *supra* at 502. Such a construction might be appropriate in a statute aimed at prohibiting incitement to riot. It is not a permissible construction of a statute aimed at prohibiting the overthrow of the government.

The difference is not a trivial one. A riot and the overthrow of organized government are vastly different things. The "clear and present danger" test is meaningless if it permits prosecution for sedition or anarchy on the basis of evidence of a clear and present danger of disorder.

Nor is this all. Even as most recently construed, the inherent vices of the statute, vagueness and overbreadth, are left untouched. The statute is now as bad as it was before the *Epton* decision and its inhibitory effect on free debate of public issues is equally chilling.

Some degree of vagueness or overbreadth may be tolerated in a regulatory statute. *Omaechevarria* v. *Idaho*, 246 U.S. 343; *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86. But "the standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement",

Winters v. *New York*, *supra* at 515. And in criminal statutes involving free speech, the standards must be even higher, *Winters* v. *New York*, *supra* at 517. In such cases a defective statute creates an inhibiting effect not only on parties to the action but on all others—an inhibiting effect upon the freedom of speech without which democracy cannot survive.

This very statute, and, indeed, one of the subdivisions under attack on this appeal, has already been considered by this Court and found to be invalid. The second and fourth counts of the present indictment allege, respectively, violation of former §161(2) and conspiracy to violate that section (A. 11a-12a). In *Keyishian* v. *Board of Regents*, *supra* at 598-599, this Court found that under §161(2) "the possible scope of 'seditious' utterances or acts have virtually no limit". The other counts under attack refer to portions of the statute which are equally objectionable.

Defendants will answer, as the court below has already answered, that the *Epton* decision has "cleaned up" the statute. We submit that the additional requirements read into the act afford insufficient protection to the Fourteenth Amendment rights of the plaintiffs and others who seek to speak their mind "although not always with perfect good taste, on all public institutions." *Bridges* v. *California*, *supra* at 270.

Both the intent limitation and the clear and present danger test which were read into the statute are basically subjective standards and mean different things to different men. We cannot afford such imprecise language where speech is involved. If we are to give full protection to "uninhibited, robust and wide open" debate on public issues and to permit "vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials," *New York Times* v. *Sullivan*, *supra* at 270, we cannot make the exercise of this right subject to a possible finding by a court and jury that the speaker had one or another

intent or that his conduct caused a clear and present danger of some evil which cannot be consistently defined even by the highest court of New York.

The clear and present danger test is particularly restrictive of personal liberties. This case and *Epton* illustrate this perfectly. Realistically, it is inconceivable that a handful of residents of Queens—a few teachers, a grocery storekeeper, a truck driver, a few students—could, in current times, pose an imminent actual threat that the government could be overthrown even if, as alleged, they had managed to collect a few rifles and had had a discussion on guerilla warfare. Such a group might conceivably cause disorder; they might even shoot someone, but these are crimes readily punishable by other statutes.[7] But overthrow the government? No one really believes that, in any literal sense. Similarly, no one really believes that a man named Epton, by making a speech on the streets of Harlem, could create a clear and present danger to the continued existence of the government of New York City or New York State.[8] This is not the Rhode Island of Dorr's Rebellion.

The overbreadth of the New York Criminal Anarchy statute and its correspondent chilling effect is not lessened in any degree by reading into it a clear and present danger test if it is

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7. As we note above, p. 3, plaintiffs Ferguson and Harris were both indicted (and later convicted) on charges of conspiracy to commit murder. All of the plaintiffs are charged, in the instant indictment, with crimes such as possession of weapons, conspiracy to commit arson and similar offenses. The people of New York are adequately protected by such indictments.

8. Literature on the causes of such disorders is rapidly growing. The most important discussion, of course, is in the Report of the National Advisory Committee on Civil Disorders (the Kerner Commission). See also Conot, *Rivers of Blood, Years of Darkness* (1967). It is generally agreed that the causes of riots are social and economic; it is nowhere suggested in this literature that riots are brought about by conduct such as that alleged here.

to be applied as loosely as the Court of Appeals did in *Epton*. Those with a conscientious regard for such statutes or those who merely fear punishment must be discouraged and inhibited by such laws, since they must know, as we all do, that one man's clear and present danger of the overthrow of government is another man's civil unrest caused by intolerable social pressures. If this Court's warning against the inhibitory effect of vague and overbroad statutes in *Button*, *Baggett* and *Dombrowski* is to have any meaning at all, it cannot be satisfied with the formula adopted here.

It will, of course, be argued that the New York court's decision was in conformity with this Court's decision in *Dennis*. We suggest that there is a difference between state and federal statutes in this regard. *Dennis* v. *United States*, *supra* at 502; *Baggett* v. *Bullitt*, *supra* at 370, n. 8. But if there is no such difference, we suggest that *Dennis* should be reexamined in the light of this Court's decisions in the past twenty years.

At its last term this Court, without dissent, held the Ohio Criminal Syndicalism statute unconstitutional, *Brandenburg* v. *Ohio*, *supra*. In so doing the Court distinguished between "mere abstract teaching" and "preparing a group for violent action and steeling it to such action". *Noto* v. *United States*, 367 U.S. 290, 297-298. Justice Douglas, in a concurring opinion, called attention to the constitutional inadequacy of the clear and present danger doctrine as it was applied in *Dennis* and other cases. We respectfully suggest that it is time that the clear and present danger doctrine were faced squarely and overruled. It is not consistent with recent decisions of the Court and it is confusing and harmful to the development of our constitutional law.

The District Court sought to meet all of these objections to the statute (as well as to the further argument made in

Point II, *infra*) by designating the plaintiffs' conduct as "hard-core," saying: "Since the statute embraced more than it permissibly could embrace, it surely embraced the 'hard-core' activities with which they are charged" (A. 71a). We do not understand the designation "hard-core" as having any application to the allegations of the indictment. Certainly the indictment shows no hard-core conduct in relation to the crime alleged. Inflammatory references in the indictment to guns and explosives still cannot turn a tiny group of alleged black militants into an organization with the power to present a clear and present danger to organized government. There is here no charge of a widespread, secret, disciplined organization with national or even international ties which might in some circumstances conceivably threaten the government. *Cf. Dennis* v. *United States*, *supra* at 511. In fact, there is no charge at all of the existence of any organization with a program and a political goal. *Cf. Dennis*, *Pierce* v. *United States*, 252 U.S. 239, *Schenck* v. *United States*, 249 U.S. 47. If we were talking of a conspiracy to commit lesser crimes, perhaps the "hard-core" analysis of the court below might be more relevant. But certainly nothing contained in this indictment justifies such a holding.

The opinion of the court below in this respect does not and never did represent the law in free speech cases. It is inconsistent with the decision in *Winters* v. *New York*, *supra*, where this Court was concerned with the statute's effect on the free speech rights of persons other than the defendant; it is inconsistent with the language in *Dombrowski* v. *Pfister*, *supra* at 486 ("[W]e have consequently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.") See also *Aptheker* v. *Secretary of State*, *supra* at

515-517; *N.A.A.C.P.* v. *Button*, *supra* at 432-433; *Landry* v. *Daley*, 280 F.Supp. 938, 948-949 (N.D. Ill. 1968).

If the statute is vague or overbroad, it is unconstitutional, and if it is unconstitutional, it ought not to be enforced against anyone, lest it have a chilling effect on everyone.

In the course of his oral presentation on the original argument of this case, counsel for the defendant Mackell discussed at some length the quantity of ammunition allegedly found on the plaintiffs, the guns and other instruments of destruction allegedly found in their possession and the nature of the written material allegedly printed and distributed by them. None of these details are in the record before this Court; they are claimed to be found in grand jury minutes not available to plaintiffs. It is therefore impossible for us to respond to an argument based on such alleged facts.

We can, however, make two brief comments:

(1) The illegal possession of guns and munitions is covered by other statutes, many of which are relied on in other counts of the indictment. There is no need to allege criminal anarchy to protect the state in such circumstances.

(2) The bombastic and often reckless rhetoric of splinter groups in our society should not be confused with a conspiracy to overthrow the government. Fringe groups of both the right and the left have always spoken in terms bearing no relationship at all to their power to act. (See, for example, *Brandenburg* v. *Ohio*, *supra*, fn. 1). Such rhetoric is a part of the normal political ferment of a democratic society. Its suppression merely suppresses free speech—it accomplishes nothing useful and has potential for great harm to our democracy.

In his original brief and in oral argument, counsel for Mackell also seemed to contend that the criminal anarchy counts

of the indictment were necessary to supply the unlawful intent needed to sustain those counts of the indictment alleging possession of weapons under former §1897(9) of the New York Penal Law. This argument has no merit. In the first place, at least three of the defendants in the indictment (Stanford, West and Noel) were charged only with criminal anarchy and conspiracy to commit the same, and not with illegal possession of weapons. In the second place, even if the crime of criminal anarchy can be utilized to provide the unlawful intent for possession charges (a doubtful proposition), there is certainly no need to allege it as a separate and independent count.

B. Abstention is inappropriate in the instant case.

Although this Court early recognized the propriety of injunctive relief, *Ex Parte Young*, 209 U.S. 123, federal courts have often abstained from adjudicating such cases in order to "avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Railroad Commission* v. *Pullman*, 312 U.S. 496, 500. It has become apparent, however, that federal courts will not apply abstention mechanically and will not abstain when useless delay and expense would otherwise result, *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 196-197, when State law is not ambiguous, *Harman* v. *Forssenius, supra* at 535, when a State court interpretation would not eliminate the constitutional issue, *Baggett* v. *Bullitt, supra* at 375-379, when the nature of the constitutional deprivation alleged is great, *Harman* v. *Forssenius, supra* at 537, and when the claimant has been vested with a right of access to the Federal courts, *McNeese* v. *Board of Education*, 373 U.S. 668, 672. In other cases abstention is not appropriate, for State statutes may be applied by local authorities in an unfair and discriminatory fashion for the purpose of harassing the defendant, *Dombrowski* v. *Pfister, supra* at 490.

Most important in the context of this case, the federal courts will not abstain where State statutes are so restrictive of liberty that their very existence has an inhibitory effect on the exercise of First Amendment rights, for those wishing to exercise those rights may be deterred by the overbreadth of the statute. Such statutes, in current parlance, have a "chilling effect upon the exercise of First Amendment rights." *Dombrowski* v. *Pfister*, *supra* at 487; they result in a general dampening of political activity, often for many years. See, for example, the 18 years during which the Feinberg Law threatened the political rights of teachers in New York. *Keyishian* v. *Board of Regents*, *supra*. In such cases, this Court has either enjoined the operation of State statutes, as in *Dombrowski* v. *Pfister*, *supra*, or has entertained actions for declaratory judgment, as in *Zwickler* v. *Koota*, *supra*.

There are two reasons why abstention is inappropriate in the instant case. First, plaintiffs claim that the Court of Appeals' reinterpretation of the statute in *Epton* is itself unconstitutional and thus to abstain would not eliminate the constitutional issue. *Baggett* v. *Bullitt*, *supra* at 375-379; *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 177-178. Secondly, should this Court abstain, it may never have the opportunity of deciding the constitutional claims raised by the plaintiffs. The state, as it did in *People* v. *Epton*, *supra*, has charged plaintiffs in one indictment not only with crimes under the Criminal Anarchy Law but also with crimes not subject to attack on constitutional grounds. Thus, as in *People* v. *Epton*, *supra*, by having an adequate State ground to support a conviction, review by this Court of the allegedly uncontitutional criminal anarchy statute will be foreclosed and its inhibiting effect on the exercise of free speech will operate unhindered.

28 U.S.C. §2283 does not mandate that this Court abstain from granting relief in an action brought, as in the instant case,

under 42 U.S.C. §1983. §2283, of course, has no application to a declaratory judgment, which can issue without injunctive relief, *Zwickler* v. *Koota*, *supra*. But more than that, §2283 does not even stand in the way of an injunction.

28 U.S.C. §2283 is not a jurisdictional statute, but rather expresses a principle of comity and equity. *Smith* v. *Apple*, 264 U.S. 274, 278-279. In *Baines* v. *City of Danville*, 337 F. 2d 579 (4th Cir. 1964) *cert. denied*, 381 U.S. 939, the court noted:

> "Since the statute was fathered by the principles of comity, it has been held that the statute should be read in the light of those principles and, though absolute in its terms, is inapplicable in extraordinary cases in which an injunction against state court proceedings is the only means of avoiding grave and irreparable injury." (*Id.* at 593, footnotes omitted.)

See also, *Southern California Petroleum Corp.* v. *Harper*, 273 F. 2d 715, 718 (5th Cir. 1960).

§2283 dates back to the Act of March 2, 1793, 1 Stat. 333, ch. 22 which stated: "nor shall a writ of injunction be granted to stay proceedings in any court of a state. . . ." In 1875 the language was rephrased and an exception was added relating to bankruptcy proceedings. Rev. Stat. §720 (1875). This provision, slightly modified, was incorporated into the Judicial Code of 1911 (§265, 36 Stat. 1162) and remained until the Judicial Code of 1948 which enacted §2283 as it presently reads.

Even before 1948, the courts had recognized that there existed implied exceptions to the language of §265 (the predecessor to §2283). In *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 132-134, this Court dealt at length with §265 and expressed disapproval of these implied exceptions, other than

those apparently authorized by statute. The Court concluded that the only true exception to the statutory command of §265 were cases involving possession of a *res*.

Even following *Toucey* v. *New York Life Ins. Co.*, and before the enactment of the Judicial Code of 1948, however, this Court continued to recognize "exceptions" to §265. *Porter* v. *Dickens*, 328 U.S. 252.

In 1948 the Judiciary Code was revised to read in its present form. The Reviser's notes to §2283 state that it was intended to restore "the basic law as generally understood and interpreted prior to the Toucey decision."

Since 1948, this Court has continued to recognize that a federal statute permitting an injunction need not expressly mention §2283 in order for it to be considered "as expressly authorized by Act of Congress." *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U.S. 511, 516; *Dilworth* v. *Riner*, 343 F. 2d 226, 230 (5th Cir. 1965). See *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220.

An examination of the purpose sought to be achieved by the enactment of §1983 leads to the conclusion that it must be read as an exception to §2283.

42 U.S.C. §1983 is derived almost intact from section 1 of the 1871 "Act to Enforce the Fourteenth Amendment".[9] The Reconstruction Congresses were concerned not only with protecting the civil rights of the newly enfranchised citizenry but also with insuring that the federal government be given the principal responsibility for this protection. These Congresses had also passed the Thirteenth, Fourteenth and Fifteenth Amendments, which the Court said in *Strauder* v. *West Virginia*,

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9. Act of April 20, 1871, ch. 22, Sec. 1, 17 Stat. 13.

100 U.S. 303, 306-307, had a common purpose, namely to secure rights to the recently emancipated slaves. See *Ex Parte Virginia*, 100 U.S. 339.

The legislative history of §1983 indicates that it was enacted to protect the rights of those newly freed and to grant them access to federal courts for the protection of those rights. See Note, *The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 Rutgers L. Rev. 92, 109-113; *Monroe* v. *Pape*, 365 U.S. 167, 180; *Landry* v. *Daley*, 288 F. Supp. 200, 223 (N.D. Ill. 1968). If 42 U.S.C. §1983 is not regarded as an exception to §2283, the statutory scheme for the protection of constitutional rights would be rendered nugatory whenever state action falling within the ban of §1983 took the form of a legal proceeding.

The considerations which underlie *Dombrowski* are equally applicable in the present situation and reinforce the view that §2283 does not require a federal court to abstain in an action brought under §1983.

As noted above, this Court in *Dombrowski* was concerned that a criminal prosecution under a statute "regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms." 380 U.S. at 486. The Court went on to recognize that

> "Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Ibid.*

Here, too, where the statute is attacked as overly broad, there is a danger to the free exercise of First Amendment free-

doms. This danger exists even though here, as opposed to *Dombrowski*, the State proceedings have already been initiated.[10]

It is the protection of the rights involved and not the mere commencement of State proceedings which is the determinative factor in deciding whether a federal court should abstain. In his dissenting opinion in *Dombrowski*, Justice Harlan recognized that it would be illogical to view the institution of a State proceeding as the factor determining whether a federal court could issue an injunction for then "standing and criminality [would] turn on which party wins the race to the forum of its own choice." 380 U.S. at 502.

The same concern for the protection of First Amendment rights by injunctive relief was reiterated in *City of Greenwood* v. *Peacock*, 384 U.S. 808, where the petitioners in their removal petition had alleged, *inter alia*, that the state statute under which they were being prosecuted was unconstitutionally vague on its face. This Court reversed the lower court's grant of the removal petition, saying, at p. 829:

> "But there are many other remedies available in the federal courts to redress the wrongs claimed by the individual petitioners in the extraordinary circumstances they allege in their removal petitions. If the state

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10. The issuance of an injunction by this Court will cause no greater "conflict" between federal and state courts than in *Dombrowski*. There the plaintiffs had been arrested on October 4, 1963. The arrest warrants were vacated by a Criminal Court Judge on October 25. The plaintiffs then brought suit in the federal courts. Following the District Court's dismissal of the complaint, the plaintiffs were indicted. Thus at the time the Supreme Court issued its decision an indictment was pending against the plaintiffs. The Court's remand to the District Court for the issuance of a decree restraining prosecution of the indictments against the plaintiffs thus had the practical effect of staying a pending state proceeding, which is exactly the situation presented herein.

> prosecution or trial on the charge of obstructing a public street or on any other charge would itself clearly deny their rights protected by the First Amendment, they may under some circumstances obtain an injunction in the federal court. See *Dombrowski* v. *Pfister*, 380 U.S. 479."

This Court thus recognized that in the circumstances of that case (where removal was obviously sought after the state prosecutions had commenced), a federal injunction would be a remedy available to petitioners. The four dissenting justices explicitly recognized that a federal court could enjoin pending state prosecutions.

> "Continuance of an illegal local prosecution, like the initiation of a new one, can have a chilling effect on a federal guarantee of civil rights. We said in NAACP v. Button, 371 U.S. 415, 433, respecting some of these federal rights, that '[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.' In a First Amendment context, we said: 'By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.' *Dombrowski* v. *Pfister*, 380 U.S. 479, 487. The latter case was a suit to enjoin a state prosecution. The present cases are close kin. For removal, if allowed, is equivalent to a plea in bar granted by a federal court to protect a federal right." 384 U.S. at 845-846.

If 42 U.S.C. §1983 is to fully protect the assertion of federal rights, 28 U.S.C. §2283 cannot be viewed as a mandate for federal courts to abstain from issuing injunctive relief.[11]

POINT II

The New Construction of the Criminal Anarchy Statute Violates Plaintiffs' Right to Due Process of Law.

Perhaps no rule of constitutional law is as basic as that a criminal statute must give clear notice of proscribed acts. The rule is a general rule and applies *a fortiori* where First Amendment rights are involved. *Lambert* v. *California*, 355 U.S. 225, 228; *Keyishian* v. *Board of Regents*, *supra*.

The New York statute was authoritatively interpreted by the state court in *Gitlow*. This "construction fixes the meaning of the statute for this case." *Winters* v. *New York*, *supra* at 514. It is now conceded by all that the interpretation of the statute in *Gitlow* rendered the law unconstitutional; this was so "as definitely as if [the statute] had been amended by the Legislature." *Id.* An unconstitutional law is void; to hold that laws heretofore determined to be unconstitutional are merely lying dormant, subject to revival by a later contrary interpretation by the courts, would be productive of endless mischief.

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11. Federal courts which have considered this question have reached different conclusions. Cases holding that §1983 is an exception to §2283 are as follows: *Baker* v. *Bindner*, 274 F. Supp. 658 (W.D. Ky. 1967); *Tribune Review Publishing Co.* v. *Thomas*, 153 F. Supp. 486 (W.D. Pa. 1957); *Cooper* v. *Hutchinson*, 184 F. 2d 119 (3rd Cir. 1950); *Ware* v. *Nichols*, 266 F. Supp. 564 (N.D. Miss. 1967) (Judge Wisdom concurring); *McSurely* v. *Ratliff*, Civ. Action 1146 (E.D. Ky. 1967); *Landry* v. *Daley*, 288 F. Supp. 200 (N.D. Ill. 1968). Cases reaching the contrary result are as follows: *Cameron* v. *Johnson*, 262 F. Supp. 873 (S.D. Miss. 1966) (Judge Rives dissenting on this point), *aff'd* 390 U.S. 611 (without reaching the question raised here); *Baines* v. *City of Danville*, 337 F. 2d 579 (4th Cir. 1964) (Judges Sobeloff and Bell dissenting on this point), *cert. denied* 381 U.S. 939; *Brooks* v. *Briley*, 274 F. Supp. 538 (M.D. Tenn. 1967); *Goss* v. *State of Illinois*, 312 F. 2d 257 (7th Cir. 1963).

The basic problem raised in this view of the case is one of due process and particularly of notice to the plaintiffs that the Criminal Anarchy Law of New York was viable after *Dennis*, *Yates* and *Keyishian*. If every man is presumed to know the law (a presumption which, in this situation, is irrebuttable), he must be presumed to know the law that exculpates him as well as the law that might find him guilty.

It is no answer to cite cases like *Poulos* v. *New Hampshire*, 345 U.S. 395, and *Cox* v. *New Hampshire*, 312 U.S. 569, to the effect that a limiting construction may be applied to conduct occurring prior to that construction "provided such application affords fair warning to the defendants." *Dombrowski* v. *Pfister*, *supra* at 491, n. 7; see also the decision below (A. 71a). There was no fair warning here.[12] On the contrary, plaintiffs had every reason to believe that the statute was a dead letter and it is hard to understand, as the court below suggests (A. 72a), how the *Epton* decision was foreseeable.

The situation presented to the Court on this record differs in no material respect from *Bouie* v. *City of Columbia*, *supra*, *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 and *Gregory* v. *City of Chicago*, 394 U.S. 111, except that, with foreknowledge of how the Court of Appeals will act,[13] the plaintiffs are asking, in advance of trial, the protection of the United States Constitution which was invoked only after trial in *Bouie*, *Shuttlesworth* and *Gregory*.

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12. The court below found "fair warning" because it thought the conduct charged against plaintiffs was "hard-core" conduct. This concept is no more controlling in considering the due process objections of plaintiffs than in considering their First Amendment objections, and for the same reasons. See *supra*, p. 15.

13. That is, since the Court of Appeals applied its new construction of the statute to Epton, we must assume, *a fortiori*, that it will apply that same construction to the plaintiffs in this case.

In *Bouie* this Court held that petitioners could not have foreseen that a narrowly written statute would have been broadened to the point where it would encompass their activities:

> "When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." (*Id.* at 354-355.)

In *Shuttlesworth* the Alabama Supreme Court had narrowly construed an overbroad city ordinance in an attempt to render it constitutional. This Court stated:

> "It would have taken extraordinary clairvoyance for anyone to perceive that this language [of the City ordinance] meant what the Supreme Court of Alabama was destined to find that it meant more than four years later; and, with First Amendment rights hanging in the balance we would hesitate long before assuming that either the members of the Commission or the petitioner possessed any such clairvoyance at the time of the Good Friday march." (*Id.* at 156.)[14]

Mr. Justice Harlan, concurring, said:

> "If these [state] officials construe a vague statute unconstitutionally, the citizen may take them at their word,

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14. If memory serves us, at the time of the oral argument on this case in the October 1968 Term, Mr. Justice Stewart, who wrote the *Shuttlesworth* opinion, suggested that he had intended the "clairvoyance" language to apply principally to members of the Commission and not to the petitioner. However that may be, it is clear that logically the point made by the opinion also applies to the petitioner's lack of "clairvoyance" especially since there are "First Amendment rights hanging in the balance".

> and act on the assumption that the statute is void." (*Id.* at 159.)

Similarly, since the Court of Appeals, in *Gitlow*, construed this vague statute unconstitutionally, the plaintiffs could take it at its word, and act on the assumption that the statute was void. Plaintiffs could no more be credited with clairvoyance than either Shuttlesworth or the members of the Birmingham Commission.

It is quite immaterial, as defendant Mackell has argued (Br. on original argument, pp. 37-38), that *Epton* was decided before the indictment herein was returned. The *acts* alleged in the indictment occurred before the decision in *Epton* was rendered,[15] and plaintiffs did not have "extraordinary clairvoyance". As Justices Black and Douglas stated, concurring in *Gregory* v. *City of Chicago*, *supra*,

> "The infringement on First Amendment rights will not be cured if the narrowing construction is so unforeseeable that men of common intelligence could not have realized the law's limited scope at the only relevant time, when their acts were committed . . . or if the law remains excessively sweeping even as narrowed." (*Id.* at 121.)

See opinion of Warren, C.J., concurred in by Brennan and Stewart, JJ., in *James* v. *United States*, 366 U.S. 213; *Lanzetta* v. *New Jersey*, 306 U.S. 451, 456.

One may reasonably be charged with foreknowledge of how a court will interpret a statute but he cannot reasonably be charged with foreknowledge that a court will reverse itself. *Cf. United States* v. *Murdock*, 290 U.S. 389, where this Court held that the defendant could not be charged with foreknowl-

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15. The *Epton* decision was on May 16, 1967; the acts alleged in the indictment were substantially before that date.

edge of the Court's subsequent interpretation of the Fifth Amendment.

The court below further sought to answer plaintiffs by arguing that even if the Court of Appeals had "transcended [its] powers" by, in effect, amending the statute, "this would be entirely a matter of state law and not one of federal concern" (A. 70a). Perhaps so, if we are speaking of the state's violation of the doctrine of separation of powers; not so, if we are speaking of due process and the failure of the state court to give "fair warning" that it would arrogate to itself a legislative function.

POINT III

The Monetary Requirement for Qualification as a Grand Juror Violates the Equal Protection Clause of the Fourteenth Amendment.

Former §596(3) of the Judiciary Law, *infra*, pp. 38-39, establishes a $250.00 monetary qualification for grand jury service, a qualification in violation of the Equal Protection Clause of the Fourteenth Amendment.[16]

In *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, this Court struck down Virginia's poll tax of $1.50 stating:

> "... We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or

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16. The monetary qualification has been eliminated from the new Judiciary Law, Sec. 596, which became effective September 1, 1967. However, the grand jurors who indicted plaintiffs were selected under the old law.

any other tax. Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.

* * *

". . . wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Id.* at 666, 670.

What the Court said with reference to the poll tax in *Harper* is equally applicable here. Poverty or affluence bear no relationship to competency to serve as a grand juror. Those who are poor are as competent to serve as those who are rich. To condition grand jury service upon a showing of monetary worth runs contrary to the very notion that the grand jury must represent a cross-section of the community.

The court below (A. 75a) recognized that a "modest property qualification for grand jurors might now be held unconstitutional." However, it dismissed plaintiffs' challenge contending that an affidavit of the Queens County Clerk demonstrated that "the property requirement had no significance in his selection of jurors" (A. 75a). However, the County Clerk's affidavit did not so state. On the contrary, his affidavit indicated that the property qualification question was asked of all prospective jurors (A. 58a). That the Clerk knows of no prospective juror disqualified *solely* on this ground is not important (A. 58a).

POINT IV

Federal Legislation Has Preempted the Field of Sedition and States May Not Pass Statutes Proscribing the Overthrow of State Governments.

When Congress enacts legislation within an area of its competence, the field is preempted and the states may not act. *Pennsylvania* v. *Nelson*, 350 U.S. 497; *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218; *Hines* v. *Davidowitz*, 312 U.S. 52. Federal legislation in the field of sedition has preempted the states from enacting statutes, such as former §§160 and 161 of the New York Criminal Anarchy Law, which proscribe advocacy of the overthrow of "organized government." "Organized government" has been interpreted by *People* v. *Gitlow*, *supra* at 138, to mean "all organized government in this country, whether it be that of the city, state or nation."[17]

That Congress has pervasively legislated in the field of sedition is apparent. A series of Congressional statutes presently in effect shows a Congressional intent to exercise the broadest powers available to it in this area. The most important is the Smith Act, 18 U.S.C. §2385. This statute makes it a crime to advocate or teach the duty or desirability of overthrowing or destroying

> "the Government of the United States or the government of any state, territory, district or possession thereof; or the governments of any political sub-division therein, by force or violence, or by the assassination of any officer of any such government."

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17. The indictment in the instant case alleges that the plaintiffs' acts were addressed to "organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies". The indictment, in an effort to save the statute, thus defines the term "organized government" in a manner different from the Court of Appeals in *Gitlow*.

The Smith Act was followed by the enactment of the Internal Security Act of 1950, 50 U.S.C. §781, *et seq.*, and the Communist Control Act of 1954, 50 U.S.C. §841, *et seq.* The latter statute applied the provisions and penalties of the Internal Security Act to a member of any organization whose purpose was to overthrow by force and violence "the Government of the United States, or the government of any state or political subdivision thereof." (50 U.S.C. §843).[18]

These enactments make no distinction between seditious activities directed toward the overthrow of the Federal Government and similar activities directed toward the overthrow of state or local governments. Congress proscribed sedition "against all government in the nation—national, state and local". *Pennsylvania* v. *Nelson*, *supra* at 505.

The considerations underlying the holding of this Court in *Pennsylvania* v. *Nelson* are equally applicable here where a state is attempting to proscribe conduct explicitly covered by the Smith Act. This Court recognized in *Pennsylvania* v. *Nelson*, *supra* at 504, the pervasiveness of Federal statutes in the field of sedition, stating that:

> "Taken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it. Therefore, a state sedition statute is superseded regardless of whether it purports to supplement the federal law."

The Federal government has the primary responsibility of protecting this country against all forms of seditious activity.

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18. The statute also made a finding (50 U.S.C. Sec. 842) that the purpose of the Communist Party is to overthrow "the Government of the United States, or the government of any State, Territory, District or possession thereof or the government of any political subdivision therein by force or violence."

The proscription against the overthrow of state and local governments contained in the Smith Act flows directly from the obligation of the Federal government "to guarantee to every State in this Union a Republican Form of Government." United States Constitution, Art. IV, §4; Internal Security Act, 50 U.S.C. §781(15).

Although the vast majority of States have made it a crime to advocate the overthrow of government, their statutes are varied and their enforcement would conflict with the uniform approach of Congressional legislation.[19] The State statutes are called "sedition statutes," "criminal syndicalism laws," and "criminal anarchy laws." Many of them are unconstitutionally vague and overbroad providing insufficient safeguards for the protection of constitutional rights.[20] Some make it a crime to overthrow the federal as well as state government;[21] others limit themselves to the overthrow of state government;[22] others just speak in terms of "government" without further definition.[23] In addition, the penalties

19. At least some states (New Mexico, Missouri, North Dakota, Oregon, South Carolina) feel amply protected by the Smith Act for they do not have statutes making it a crime to overthrow any government.

20. Miss. Code Anno. Sec. 2399. "Any person who advocates in writing or in print or verbally, or otherwise, the overthrow of the Constitution or Government of the United States or the constitution or the government of the State of Mississippi, by violence shall be deemed guilty of a felony. . . ." See also Fla. Stat. Anno. Secs. 876.01, 876.02; Ga. Code Anno. Sec. 26-903a (Supp. 1963); Ill. Rev. Stat. ch. 38, Sec. 30-3; La. Stat. Anno. Sec. 14:115; Mich. Stat. Anno. Sec. 28.243(2); New Jersey Stat. Anno. Sec. 2A:148-7; N. Carolina Gen. Stat. Sec. 14-11; Rhode Island Gen. Laws Sec. 11-43-12; Va. Code Sec. 18.1-421 (Supp. 1962); W. Va. Code Sec. 5912.

21. Del. Code Sec. 862; Texas Civil Stat. Anno. 6889-3A, Sec. 5; Wisc. Stat. Anno. Sec. 946.03.

22. Ill. Rev. Stat. Ch. 38, Sec. 30-3; Neb. Rev. Stat. Sec. 28-748 (Supp. 1963).

23. Nev. Rev. Stat. Sec. 203.130; New Jersey Stat. Anno. Sec. 2A:148-7; Rev. Code Wash. Anno. Sec. 9.05.010.

vary.[24] Furthermore, some statutes appear to punish mere membership in subversive organizations, contrary to the requirements laid down in *Scales* v. *United States*, 367 U.S. 203; *Noto* v. *United States*, 367 U.S. 290; *Aptheker* v. *Secretary of State*, *supra*. See *Pennsylvania* v. *Nelson*, *supra* at 508.

Nothing in either *Pennsylvania* v. *Nelson*, *supra*, *Uphaus* v. *Wyman*, 360 U.S. 72 or *DeGregory* v. *Attorney General of New Hampshire*, 383 U.S. 825, holds that a state may proscribe seditious activity directed against itself. In *Nelson*, this Court, in enumerating situations in which the states were free to act, did *not* list sedition directed against a state as such a situation (350 U.S. at 500). In distinguishing *Fox* v. *Ohio*, 46 U.S. (5 How.) 410 and *Gilbert* v. *Minnesota*, 254 U.S. 325, this Court made clear that states could prosecute for offenses already prohibited by federal law only if a different aspect of the alleged conduct violated the police power of the state. Thus, in *Fox* a federal statute against the passing of counterfeit money was held not to bar a state prosecution for defrauding the person to whom the spurious money was passed. The state statute in *Gilbert* was upheld as a "local police measure." But the New York Criminal Anarchy Law is not such a "local police measure." It covers the same kind of conduct, in substantially identical language as the Smith Act and both are intended to protect the same interest of society.

In *Uphaus* v. *Wyman*, *supra*, this Court, in affirming a state contempt conviction for refusal to answer questions posed by a New Hampshire legislative committee, stated at p. 76, that *Nelson* proscribed a "race between federal and state prose-

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24. Arizona Rev. Stat. Sec. 13-707 (Supp. 1963) (up to 20 years and/or up to $20,000 fine); Mass. Laws Anno. C. 264, Sec. 11 (up to 3 years or $1,000 fine); Neb. Rev. Stat. Sec. 28-748 (Supp. 1963) (1-20 years).

cutors to the courthouse door. The opinion made clear that a State could proceed with prosecutions for sedition against the State itself; . . . "

We respectfully suggest that this dictum results from a misreading of *Nelson*. In the first place, *Nelson* did not say that a state could proceed with prosecutions for sedition against the state itself. Rather it affirmed "the right of states to enforce their sedition laws *at times when the federal government has not occupied the field and is not protecting the entire country from seditious conduct*" (*Nelson*, at p. 500, emphasis supplied). In the second place, to permit the state to prosecute for sedition against itself results in the very evil that this Court in *Uphaus* was trying to guard against, namely, a race between federal and state prosecutors to the courthouse door since the Smith Act proscribes sedition against both the federal and state governments.

Furthermore, this Court, in the language above quoted from *Uphaus*, ignores the reality of modern life. A revolutionary movement which seeks the overthrow of only the state government and not the federal would be inconceivable in the highly integrated society of today. *Cf. Luther* v. *Borden*, 48 U.S. (7 How.) 1.

The dictum at p. 76 of the *Uphaus* decision can be reconciled with the doctrine of *Nelson* by reading it in connection with the language of the Court's illustrations, at p. 77, of permissible state action:

> "Thus registration statutes, *quo warranto* proceedings as to subversive corporations, the subversive instigation of riots, and a host of other subjects directly affecting state security furnish grist for the State's legislative mill."

These examples are a far cry from the prosecution undertaken against plaintiffs in this case.

In *DeGregory* v. *Attorney General of New Hampshire*, *supra*, this Court, citing *Pennsylvania* v. *Nelson*, *supra*, reversed another New Hampshire contempt conviction, stating in the course of its opinion, "There is no showing whatsoever of present danger of sedition against the State itself, the only area to which the authority of the State extends." (383 U.S. at 829-830).

The meaning of this dictum is somewhat obscure. The *Nelson* opinion not only made no distinction between what may be termed "state sedition" and "federal sedition", but expressly noted that the Smith Act's prohibition extended to state as well as federal sedition. (350 U.S. at 502).

Furthermore, taken in the context of the case, the Court's language in *DeGregory* makes clear that it was talking about the power of a state legislative committee to conduct *investigations*, not with the power of a state to proscribe seditious language.

A holding that the state sedition statutes are preempted does not mean that states are powerless to protect themselves. This Court recognized in *Nelson* that states may "enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct." (350 U.S. at 500). Beyond that, however, a state may enact innumerable statutes under which threatened acts of violence may be prosecuted. The instant case is an example. The plaintiffs were indicted not only for criminal anarchy, but also for conspiracy to commit arson, and for 41 counts of illegal possession of weapons under conventional state statutes looking to the prevention of crimes of violence. Two of the plaintiffs were charged in a separate indictment with conspiracy to murder. In addition the state has the power to prosecute under statutes relating to homicide, arson, riot, incit-

ing to riot, and unlawful assembly.[25]

If the states are to be permitted to prosecute for the conduct prohibited by the Smith Act simply because overthrow of the state government is an incident of a design to overthrow the government generally, then the rule of *Nelson* is reduced to a mere matter of pleading. Indeed, that was the case in the Queens County prosecution here under attack. The first indictment had alleged that plaintiffs had advocated the duty of overthrowing "organized government". This indictment was dismissed on the ground that it conflicted with the holding in *Nelson*. *People* v. *Ferguson*, 55 Misc. 2d 823, 831 (1968). The grant jury thereupon found a superseding indictment alleging advocacy of the overthrow of New York State.

CONCLUSION

The judgment of the court below should be reversed and the court directed to issue a declaratory judgment that former §§160, 161 and 163 are unconstitutional and to enjoin any prosecution of the plaintiffs under these sections.

Respectfully submitted,

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August 9, 1969

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25. New York's Penal Law former Secs. 1041, 221, 2090, 2091, 2092 respectively. These Sections have their counterpart in the new Penal Law. See 125.25, 150.15, 240.06, 240.08, 240.10.

APPENDIX

New York Penal Law

"§160. Criminal anarchy defined

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony."

"§161. Advocacy of criminal anarchy

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by fine of not more than five thousand dollars, or both."

"§163. Permitting premises to be used for assemblages of anarchists

The owner, agent, superintendent, janitor, caretaker or occupant of any place, building or room, who wilfully and knowingly permits therein any assemblage of persons prohibited by section one hundred and sixty-two, or who, after notification that the premises are so used permits such use to be continued, is guilty of a misdemeanor, and punishable by imprisonment for not more than two years, or by a fine of not more than two thousand dollars, or both."

"§580. Definition and punishment of conspiracy

If two or more persons conspire:

1. To commit a crime; or,

* * *

Each of them is guilty of a misdemeanor."

New York Judiciary Law

"§596. Qualifications of jurors

In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must:

* * *

3. Be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value."

18 U.S.C. §2385. Advocating overthrow of Government

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $20,000 or imprisoned not more than twenty years,* or both, and shall

* The 1956 Amendment substituted "$20,000" for "10,000" and "twenty years" for "ten years".

be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

If two or more persons conspire to commit any offense named in this section, each shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.*

As used in this section, the terms "organizes" and "organize," with respect to any society, group, or assembly of persons, include the recruiting of new members, the forming of new units, and the regrouping or expansion of existing clubs, classes, and other units of such society, group, or assembly of persons."**

42 U.S.C. §1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. §2283. Stay of State court proceedings

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

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* The 1956 Amendment added this paragraph
** The 1962 Amendment added this paragraph

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Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~69~~ 7

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants,

against

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

No. ~~70~~ 9

FRED FERNANDEZ,

Plaintiff-Appellant,

against

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON REARGUMENT FOR APPELLEE ATTORNEY GENERAL OF THE STATE OF NEW YORK

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Supreme Court of the United States

OCTOBER TERM, 1969

No. 11

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants,

against

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

No. 20

FRED FERNANDEZ,

Plaintiff-Appellant,

against

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON REARGUMENT FOR APPELLEE ATTORNEY GENERAL OF THE STATE OF NEW YORK

Statement of the Case

Appellants are residents of the City and State of New York. On or about June 20, 1967 an indictment was found by a grand jury and filed in Supreme Court, Queens County, charging appellants with violating New York's criminal anarchy law (former §§ 160, 161 and 580(1) of the Penal Law of New York), and 39 counts charging 8 of the appellants with possession of hand guns and shoulder guns in violation of former Penal Law § 1897 subdivisions 2, 3 and 9.

On January 15, 1968 a superseding indictment was filed against the plaintiffs, again charging them with violation of the criminal anarchy law and unlawful possession of certain weapons, and alleging that appellants intended that the acts be presently attempted and accomplished with the object of overthrowing the Government of New York. The means of accomplishing the overthrow were stated as "by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline" (Nos. 580, 10a, 11a, 12a, 13a and 14a), and "by sabotage of public transportation and communication facilities" (Nos. 580, 11a, 13a). Another count charged conspiracy to commit arson in the third degree against eight appellants (Nos. 580, 17a-18a).

Appellants filed a complaint in the Southern District of New York on March 12, 1968 alleging that the criminal anarchy law was void on its face and as applied to them, in that it violated the First, Fifth and Fourteenth Amendments to the United States Constitution. It was further alleged that the criminal anarchy law had been superseded by 18 U.S.C. § 2385 (known as the Smith Act), and was therefore unconstitutional. Former § 596(3) of the New York Judiciary Law, which required a $250 monetary qualification for grand jury service, was also alleged in the complaint to violate the Fourteenth Amendment to the United States Constitution.

Appellants requested declaratory and injunctive relief and the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284. After the matter was referred to a three-judge court, plaintiffs moved for summary judgment. On June 26, 1968, the three-judge court dismissed the complaint, holding that the statutes at issue were constitutional and had not been pre-empted by federal law. The Court also held that aside from the argument on the merits, it would consider the granting of relief to appellants inappropriate under the circumstances, since there could be no chilling effect on prospective First Amendment rights. As to the contention that the grand jury property qualification was unconstitutional, the Court pointed out that there was no reason why these contentions could not be effectively presented in the New York Courts and to the Supreme Court on review.

This Court heard argument on appeal from the Southern District decision in the October 1968 term, and the within brief is filed in response to appellants' briefs on reargument.

POINT I

Since exercise of federal jurisdiction would unwarrantedly interrupt pending state criminal proceedings, the injunctive and declaratory relief requested by appellants was properly denied.

Where a pending state action provides full opportunity to test constitutional claims, well-established principles of federalism require that such claims be adjudicated in the state courts, subject to review by this Court. As was said in *Dombrowski* v. *Pfister,* 380 U. S. 479, 484 (1965):

> "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court and that the mere possibility of erroneous initial application of constitutional stand-

ards will usually not amount to irreparable injury necessary to justify a disruption of orderly state proceedings."

This Court's recent decision in *Zwickler* v. *Koota*, 389 U. S. 241, 253 (1968), noted with respect to non-intervention* that it "recognized the continuing validity of that pronouncement."

Moreover, 28 U.S.C. § 2283 prohibits injunctive intervention except where expressly authorized by act of Congress. Since 42 U.S.C. § 1983 (under which appellants bring this suit) merely makes a broad reference to rights conveyed under any federal law or the Constitution and creates no independent rights in itself, this section cannot qualify as an "expressly authorized" exception.

Aside from the statutory bar of § 2283, it has long been settled that intrusions upon the state criminal process are permissible only where the intervention is required to prevent irreparable injury which would be both great and immediate. *Douglas* v. *City of Jeannette*, 319 U. S. 157, 163, 164 (1943); *Wells* v. *Reynolds*, 382 U. S. 39 (1965), affirming *Wells* v. *Hand*, 238 F. Supp. 779 (M. D. Ga. 1965); *Stefanelli* v. *Minard*, 342 U. S. 117 (1951); *Dombrowski* v. *Pfister, supra; Zwickler* v. *Koota, supra; Cameron* v. *Johnson*, 390 U. S. 611 (1968); *Pugach* v. *Dollinger*, 277 F. 2d 739 (2d Cir. 1960), aff'd 365 U. S. 458 (1961); *Zwicker* v. *Boll*, 270 F. Supp. 131 (W. D. Wis. 1967), aff'd 391 U. S. 353 (1968).

Nothing in appellants' briefs has demonstrated that the pending prosecutions threaten them with immediate and irreparable injury. Intervention would not even stay

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* This Court has differentiated abstention from non-intervention. The former is relevant where a plaintiff has exercised his right to choose a federal rather than a state forum for the hearing of his federal claims. The latter is relevant where a defendant already in a state forum seeks to enjoin that forum from proceeding, as in the instant case.

prosecution under the other statutes involved in the indictments. Appellant Samuels (Br. on Rearg. p. 17) suggests that adjudication by the state courts would result in "useless delay and expense . . . .". However, he furnishes no support for this assertion, nor does he show how this prosecution differs in respect to time or expense from those in which the federal courts have consistently refused to intervene. *Stefanelli* v. *Minard, supra.*

Indeed, it does not appear that appellant has "been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford . . . [appellant] any protection which . . . [he] could not secure by prompt trial and appeal . . .". *Dombrowski* v. *Pfister, supra,* 380 U. S. at 485 (1965); *Douglas* v. *City of Jeannette, supra; Stefanelli* v. *Minard, supra.*

It is contended (Br. on Rearg., pp. 21-22) that there is irreparable injury within the meaning of *Dombrowski* v. *Pfister, supra,* because the statute at issue is overly broad and presents a danger to the free exercise of First Amendment rights. No prosecution was pending in *Dombrowski* at the time that plaintiffs filed suit in the federal courts. Any attempt to analogize the facts herein with the facts in *Dombrowski* must fall on other grounds as well. In *Dombrowski,* this Court had before it a vague statute which could not be reconstituted in a single adjudication. Here this Court has a statute upon which the Smith Act was based, and which has been authoritatively interpreted by the New York Court of Appeals in the same manner as the Smith Act was construed in *Dennis* v. *U. S.,* 341 U. S. 494. In *Dombrowski,* unlawful searches at gunpoint were effectuated not to secure a valid conviction but as a technique of harassment. Here, the search which uncovered an arsenal of weapons was conducted the day after the Grand Jury indicted appellants, and the fruits of this

valid search confirmed the evidence presented to the Grand Jury.

This Court made clear in *Cameron* v. *Johnson*, *supra*, 390 U. S. at 618-619:

> "In short, we viewed *Dombrowski* to be a case presenting a situation of the 'impropriety of (state officials) invoking a statute in bad faith to impose continuing harassment in order to discourage appellants' activities."

As to the assertion of overbreadth, alleged constitutional defects could not alone support federal intervention in a pending criminal proceeding even if such defects existed. (Appellee will show that they do not in Point III, *infra*). *Douglas* v. *City of Jeanette*, *supra*, 319 U. S. at 163. There has been no showing that the state courts will fail to apply constitutional standards in any subsequent judgments. Cf. *City of Greenwood* v. *Peacock*, 384 U. S. 808, 827 (1966); *People* v. *Epton*, 19 N. Y. 2d 496 (1967).

Nor does the statute at issue affect an impermissible chilling of First Amendment rights. Appellants' prosecutions under the former Penal Law (as well as any prosecution under the new Section 240.15) must be governed by *Epton's* requirements, which preclude application of a statute to mere advocacy of doctrine (see Point III, *infra*).

Moreover, the "chilling effect" on protected speech which the First Amendment seeks to prevent applies solely to inhibition on future conduct. As recently stated in "Constitutional Law: Federal Declaratory and Injunctive Relief Unnecessary to Protect First Amendment Rights in light of *People* v. *Epton's* Interpretation of New York Criminal Anarchy Law," Syracuse Law Review, Spring Issue (1969), at page 777:

> "[I]t would appear that unless a petitioner can clearly and specifically demonstrate his constitutional

> need for declaratory or injunctive relief to protect First Amendment rights in prospective situations, the general rule, viewing such relief as an extraordinary remedy, will prevail."

The judicial clarification of the statute insures that neither appellants nor anyone else will be stifled as to "free debate of public issues" (Br. on Rearg. of Appellant Samuels, p. 11).

The same considerations underlie appellants' request for declaratory relief. This remedy was created under 28 U.S.C. § 2201 to guide litigants in their future legal relationship. If appellants seek a declaration as to future rights to "express views on subjects of great national importance" as alleged in the affidavit of George Samuels (p. 37-a Samuels Appendix), *Epton* has already given them that assurance, and there is no longer any real or immediate controversy under this Court's decision in *Golden* v. *Zwickler*, 394 U. S. 103 (1969).

Analysis of the discretionary elements which govern the appropriateness of declaratory judgment also leads inevitably to the conclusion that a declaration must be denied here. First, as previously noted, the other counts in the indictment would still be prosecuted regardless of the anarchy counts and thus the declaration would be completely ineffectual. Moreover, the decisions of this Court have clearly indicated that where a state criminal prosecution is in progress, a declaratory judgment rendered as a substitute for injunction would be as effective a disruption as would injunctive intervention. See, *e.g.*, *Shaw* v. *Garrison*, 393 U. S. 220 (1968); *Brooks* v. *Briley*, 391 U. S. 361 (1968), affirming 274 F. Supp. 538 (M. D. Tenn., 1967); *Zwicker* v. *Boll*, *supra*; *Fenster* v. *Leary*, 386 U. S. 10 (1967), affirming 264 F. Supp. 153 (S.D.N.Y. 1966).

Where no guidance as to legitimate activities is needed, appellants' request becomes merely an attempt to circum-

vent the principle of non-intervention in state criminal proceedings, and to obscure the fact that they have not been able to show any irreparable injury. The Court below explicitly noted that quite apart from appellants' arguments on the merits, "the need of federal declaratory or injunctive relief to protect plaintiff's constitutional rights with respect to future conduct or events—is wholly absent here."*

POINT II

The property qualification for jurors has been repealed by the New York Legislature and in fact was never applied even before its repeal, and therefore cannot constitute a basis for federal intervention in State court criminal proceedings.

Monetary qualifications for Grand Jury service were eliminated from the new Judiciary Law, § 596, which became effective September 1, 1967. However, appellants attack the constitutionality of former § 596(3) of the Judiciary Law on the theory that the grand jurors who indicted appellants were selected under the old law.

Although the repealed provision established a $250 monetary requirement for Grand Jurors, this provision was never in fact applied to the Grand Jury in appellants' cases (nor to any others in the county). The affidavit of the Queens County Clerk, who administered the selection of Grand Jurors, stated in unequivocal terms that it was his presumption that everyone possessed the minimal amount of property specified and that therefore he disqualified no one on this ground.

Where there is no factual basis for a claim of discrimination in jury selection and where the provision in question is no longer even in existence, federal intervention

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* Appendix of Fernandez, p. 66.

cannot be justified. *Cf. Stefanelli* v. *Minard*, 342 U. S. 117 (1951). Thus, the court below commented:

> "[W]e see no reason why the plaintiffs' contentions as to grand jury selection cannot be effectively presented in the New York courts and to the Supreme Court on review . . . Indeed, these questions, going to the validity of this and many other indictments, seem peculiarly a matter to be determined by the state courts in the first instance. Chestnut v. New York [370 F. 2d 1, 6-8 (2nd Cir. 1966), cert. denied 386 U. S. 1009 (1967)], U. S. ex rel. Epton v. Nenna, 281 F. Supp. 388, 390 (S.D.N.Y. 1968)."

POINT III

New York's anarchy statute is based upon a legitimate and valid State interest and is in harmony with the United States Constitution.

A

Appellants' attack on New York's criminal anarchy law poses the question of whether a State has a valid interest in prohibiting incitement intended to cause its own overthrow, where imminent risk of such overthrow is present. The meaning of New York's anarchy law was set out by the New York Court of Appeals in *People* v. *Epton*, 19 N. Y. 2d 496, 227 N. E. 2d 829 (1967), cert. den. app. dism. 390 U. S. 29 (1968), reh. den. 390 U. S. 976 (1968). There the New York Court held:

> "The advocacy of the overthrow of the Government by force and violence must be accompanied by an intent to accomplish the overthrow (*Dennis* v. *United States* [241 U. S. 494]; *Keyishian* v. *Board of Regents*, 385 U. S. 589) and there must be a clear and present danger that the advocated overthrow may be attempted or accomplished (*Dennis* v. *United States*, *supra*)."

This authoritative interpretation by New York's highest Court places pure speech and mere advocacy outside the ambit of the statute.

This Court's most recent analysis of the constitutionally permissible limits of State statutes dealing with advocacy of anarchy is the *per curiam* opinion in *Brandenburg* v. *State of Ohio*, —— U. S. ——, 37 U. S. Law Week 4525 [decided June 9, 1969]. There the Court had before it the Ohio Criminal Syndicalism Act, which prohibited any assemblage of persons "formed to teach or advocate the doctrines of syndicalism", and which had never been construed by the Ohio courts so as to bring it into harmony with the constitutional precepts enunciated by this Court in recent cases (37 U. S. Law Week at 4526, n. 3).

This Court noted that cases such as *Dennis* v. *United States*, 341 U. S. 494, 507 (1951), "have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action*". (Emphasis added) (37 U.S.L.W. at 4525-4526). It was held that "a statute *which fails to draw this distinction* [between abstract teaching and preparation of a group for violent action] impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments." (Emphasis added) (37 U.S.L.W. at 4526).

The rationale of *Brandenburg* demonstrates that there are two categories of statutes restricting advocacy of anarchy. Statutes in the first category penalize citizens merely for the expression of unpopular views. Ohio's Criminal Syndicalism Act, as an example of this, was based on a "bald definition of the crime in terms of mere advocacy not distinguished from incitement of imminent lawless action" (37 U.S.L.W. at 4526). This definition was

not limited by the indictment or by the trial judge's instructions to the jury (37 U.S.L.W. at 4526).

In the second category are laws such as the Smith Act, 18 U.S.C. § 2385, and New York's criminal anarchy law, which have been strictly and narrowly construed so as to avoid any encroachment upon activities which merely advocate without intention to incite.*

Appellant Samuels, however (Br. on Reargument, pp. 10-11), argues that this Court's decision in *Dennis* is insufficient support for New York's statute because the *Epton* court referred to the danger "that the riots then rocking Harlem would be intensified or, if they subsided, rekindled." Appellant seeks to distinguish incitement to such activity from incitement to overthrow the government.

Appellant apparently contends that while a threat to overthrow the government could be posed by organizations that are national and international in scope, no such threat could be posed by armed local groups. This assumption is highly unrealistic. In recent years, extremist groups of various political persuasions have operated within local areas and through violent means. Frequently their target is a branch or service of local government, such as the police department, welfare department, fire department or a transportation facility. Local government is effectively immobilized by the creation of massive disorder and by the breakdown of essential services. Such activities create clear and present danger as defined by this Court in *Yates*

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* Appellant Fernandez argues (Supplemental Br. p. 6) that the Court of Appeals in *Epton* misinterpreted the statute, since the New York State Legislature had repealed § 160 *et seq.* of the former Penal Law and substituted § 240.15 before the *Epton* decision. This new Penal Law provision does not contain *in haec verba* the clear and present danger test. However, as pointed out by the court below, the correctness of the Court of Appeals analysis of a state statute is entirely a matter of state law and has no relevance to the federal questions in this case.

v. *United States*, 354 U. S. 298, 321 (1957) and *Dennis* v. *United States, supra*, 341 U. S. at 509-511.

B

It is also contended by appellant Fernandez (Supplemental Br. p. 17) that, even assuming *arguendo* that *Epton* had construed the statute so as to eliminate any constitutional objection, the statute cannot be properly applied to appellants because they had no notice of the May, 1967 interpretation. This contention has two aspects: (1) whether appellants had reason to believe that the conduct for which they have been indicted was unlawful at the time the acts were committed, and (2) whether the statute was so overbroad or vague that it contained insufficient guidance as to what would be considered punishable.

Curiously, appellant Samuels suggests (Br. on Rearg. p. 25) that the criminal anarchy law was not viable after *Dennis* and therefore he could be presumed to know that New York law would exculpate him for the acts in question. However, the effect of *Dennis* on the present case is quite the contrary—since the New York statute was the prototype for the Smith Act, it was clearly predictable that both statutes must be interpreted in the same manner.

It should be noted that the convictions of the defendants in *Dennis* were upheld by this Court because the Smith Act had been properly applied by the *trial court* so as to contain the requisite standards as to intent and danger. At the time that the acts at issue in *Dennis* were committed, the authoritative analysis of the Smith Act by the federal courts had not yet occurred. However, defendants were not thereby immunized from prosecution.

Moreover, as in *Dennis*, the "hard-core" activities with which appellants herein are charged render their claim

that they believed themselves free to engage in such activities wholly untenable. Appellants are charged with a 48 count indictment which includes 41 counts for unlawful possession of rifles, pistols, shotguns and zipguns (Samuels' App. pp. 21a-31a), one count for conspiracy to burn and set fire to certain transportation facilities (Samuels' App. pp. 17a-18a) and the charge of conspiring to assassinate public officers (Samuels' App. p. 13a). It is an exercise in irony to analogize such activities to "vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials" (*New York Times* v. *Sullivan,* 376 U. S. 254, 270), as appellant Samuels seeks to do (Br. on Rearg. p. 12).

Advocacy of anarchy, which the State is here attempting to prevent, cannot be isolated from the totality of facts and circumstances surrounding the alleged criminal behavior of appellants. Appellants were not scholars engaged in teaching or political debate (compare *Keyishian* v. *Board of Regents,* 385 U. S. 589 [1967]). They were self-styled revolutionaries who allegedly were making active preparations to bring about the breakdown of local government. As observed by the court below, "no court of New York had ever told the defendants they could engage in the type of activity charged in the indictment with impunity".*

Equally untenable are appellants' claims of overbreadth and vagueness. This Court held in *Dennis* that it made "no difference, from the standpoint of vagueness, whether the standard of 'clear and present danger' is one contained in *haec verba* within the statute, or whether it is the judicial measure of constitutional applicability." 341 U. S. at 515. Thus, the import of the *Dennis* case is that the New York statute will be preserved by a proper judicial application of the "clear and present danger" standard to the facts of a particular case.

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* Appendix of Fernandez, p. 65.

Appellants' reliance on *Shuttlesworth* v. *City of Birmingham*, 394 U. S. 147 (1969), is entirely misplaced. It must be remembered that the Supreme Court of Alabama upon the appeal in that case had construed the statute narrowly so as to eliminate constitutional objections, but had not voided the convictions at issue. Petitioners there had engaged in a peaceful and orderly march but were convicted of parading without a permit because they failed to obtain a license under a law which was unconstitutional as written.

This Court held:

> "We may assume that the ordinance as now authoritatively construed would pass constitutional muster. It does not follow, however, that the severely narrowing construction put upon the ordinance by the Alabama Supreme Court in November of 1967 necessarily serves to restore constitutional validity to a *conviction* that occurred in 1963 under the ordinance as it was written." (Emphasis added) (394 U. S. at 155)

This Court allowed the statute to stand but reversed the convictions thereunder. The *Shuttlesworth* case therefore establishes the proposition that a proper interpretation of a state statute saves its constitutionality, but that convictions must be governed by the new interpretation or be subject to reversal.

In the case at bar, appellants have neither been tried nor convicted. The conduct of their trial, the kind of evidence to be admitted and the judge's charges to the jury must be governed by the decision in *Epton*. Consequently, any resulting conviction would take place under the narrowing interpretation and not under the statute as it was written in 1902.

Appellants are no doubt aware that in *Dombrowski* v. *Pfister, supra*, 380 U. S. at 491, fn. 7 (1965), this Court

approved the application of a limiting construction to conduct occurring prior to such construction. The only requirement is that the application afford forewarning to the defendants. See in accord *Poulos* v. *New Hampshire,* 345 U. S. 395 (1952); *Cox* v. *New Hampshire,* 312 U. S. 569 (1941). Here the statute was, of course, made narrower rather than broader by the *Epton* construction. Therefore, there can be no question that the statute as written provided warning of its applicability to appellants' activities.

C

The conduct at issue herein is very far removed from the area of pure speech. It is charged in the indictments that appellants planned to kill police officers and state officials, and to burn transportation facilities. Preparations had been made to accomplish these ends by accumulating the appropriate weapons and by observing the sites that were to be burned.

However, this Court has made clear that even acts of pure speech, unmixed with acts such as those charged in the indictment, may be a basis for criminal prosecution. Contempt of court is an example of this. As was held in *Wood* v. *Georgia,* 370 U. S. 375, 383 (1961):

> "We start with the premise that the right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government and that courts necessarily must possess the means of punishing for contempt when conduct tends directly to prevent the discharge of their functions."

Thus, when an act of speech threatens to immobilize a governmental branch, it may be penalized if it creates a clear and present danger of accomplishing its end. In *Wood* v. *Georgia,* this Court reversed the conviction of a sheriff who made public statements concerning charges

delivered to a Grand Jury. However, the basis for the reversal was not the fact that the conviction had been based upon speech alone, but rather that no showing of clear and present danger had been made.

A threat to any branch of the government, when it is immediate and real, is of particularly serious import since, as this Court said in *Dennis*, 341 U. S. at 509:

> "If a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value will be protected."

Pure speech has also been punishable under criminal defamation laws. This Court has permitted such sanctions where a falsehood is maliciously and knowingly uttered. As was said in *Garrison* v. *Louisiana*, 379 U. S. 64, 75 (1964):

> "That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution."

Such automatic constitutional protection would be particularly inappropriate in the case at bar, where speech and action are inextricably intertwined. Appellants were not persons merely engaged in the discussion of radical ideas, but are charged with preparing to carry out these ideas by violent means. In this context, advocacy of criminal anarchy takes on far more than academic significance.

POINT IV

New York's anarchy statute is not superseded by federal anti-sedition legislation.

The decisions of this Court make it apparent that Congress did not pre-empt the states from enacting legislation to safeguard their internal security.

In *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956), a case strongly relied on by appellants, an acknowledged member of the Communist Party was convicted under a Pennsylvania statute for sedition against the government of the United States. This Court reversed the conviction because Congress had pre-empted the field of national security by the passage of the Smith Act of 1940, the Internal Security Act of 1950, and the Communist Control Act of 1954. However, the majority opinion of former Chief Justice Warren made it clear that the States retained the power to protect themselves:

> "It should be noted at the outset that the decision in this case does not affect the right of States to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct . . . Neither does it limit the right of the State to protect itself at any time against sabotage or attempted violence of all kinds. Nor does it prevent the State from prosecuting where the same act constitutes both a federal offense and a state offense under the police power, as was done in *Fox* v. *Ohio*, 5 How. 410, and *Gilbert* v. *Minnesota*, 254 U. S. 325 . . ." (350 U. S. at 500).

This position was reaffirmed three years later in *Uphaus* v. *Wyman*, 360 U. S. 72 (1959). In answer to appellant's contention that the Smith Act had superseded the New Hampshire Subversive Activities Act of 1951, this Court said:

> "In *Nelson* itself we said that 'the precise holding of the court . . . is that the Smith Act . . . which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct*.' (Italics supplied.) 350 U. S. at 499. The basis of

> *Nelson* thus rejects the notion that it stripped the states of the right to protect themselves . . . The opinion made clear that a state court proceed with prosecutions for sedition against the state itself . . . Nor did our opinion in *Nelson* hold that the Smith Act had proscribed state activity in protection of itself either from actual or threatened 'sabotage or attempted violence of all kinds.' In footnote 8 of the opinion it is pointed out that the state had full power to deal with internal civil disturbances." (360 U. S. at 76-77)*

See also *DeGregory* v. *New Hampshire Atty. Gen.*, 383 U. S. 825, 827 n. 2 (1966); *State* v. *Cade*, 244 La. 543, 153 So. 2d 382 (1963), *appeal dism., cert. den.* 375 U. S. 44 (1963).

Analysis demonstrates that federal anti-sedition legislation is directed toward conspiratorial organizations that are national and international in scope. The Smith Act of 1940 was passed after World War II had begun, and during the time that Nazi Germany and Soviet Russia were aligned under a pact of non-aggression. The danger which Congress sought to prevent was the subversion of national and local governments by organizations that were supported and directed by sources outside of the United States. Manifestly, this was the concern of Congress in passing the Internal Security Act of 1950 and the Communist Control Act of 1954. As this Court noted in *Nelson:*

> "Congress has devised an all-embracing program for resistance to the various forms of totalitarian aggression. Our external defenses have been strengthened, and a plan to protect against internal subversion has

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* Appellant Samuel's claim (Br. on Rearg. p. 34) that this Court's holding in *Uphaus* "results from a misreading of Nelson" is remarkably unhelpful.

been made by it . . . It has charged the Federal Bureau of Investigation and the Central Intelligence Agency with responsibility for intelligence concerning Communist seditious activities against our Government, and has denominated such activities as part of a world conspiracy. It accordingly proscribed sedition against all governments in the nation—national, state and local . . . Congress having thus treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem. As was said in the court below:

'Sedition against the United States is not a *local* offense. It is a crime against the *Nation*. As such, it should be prosecuted and punished in the Federal courts . . . It is not only important but vital that such prosecutions should be exclusively within the control of the Federal Government. . . .' " (350 U. S. at 504-505)

The New York statute is a protection against modern forms of criminal anarchy, and the kinds of local extremist activity described in Point III(A) *supra*. The indictment in the instant case charges appellants with advocating the overthrow of local government and its agencies by means of force. This allegation is not merely "a matter of pleading" as alleged by appellant Samuels (Br. on Rearg. p. 36). The targets for assassination described in the indictment are all state and local officials. Unlike *Nelson*, there is no attempt to regulate conduct affecting national security.

CONCLUSION

For the foregoing reasons the decision below should be affirmed.

Dated: New York, New York, September 9, 1969.

Respectfully submitted,

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FILE

SEP 25 1969

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Supreme Court of the United States

October Term, 1969

No. ~~11~~ 7

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

No. ~~28~~ 9

FRED FERNANDEZ,

Plaintiff-Appellant,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF ON REARGUMENT FOR APPELLEE DISTRICT ATTORNEY

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§ 295-e 3, 9, A8

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§ 295-g 3, 9, A9

New York Judiciary Law:

§ 596 Subd. 3 (repealed) 3, 44, A9

Legislative History:

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Supreme Court of the United States

October Term, 1969

No. 11

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

No. 20

FRED FERNANDEZ,

Plaintiff-Appellant,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF ON REARGUMENT FOR APPELLEE DISTRICT ATTORNEY

Introduction

This is a direct appeal from a judgment of a three-judge District Court dismissing complaints seeking relief in form

of injunction and declaratory judgment. The appellants are defendants in a criminal action pending in a State court since June 20, 1967. Jurisdiction of the federal court was invoked nine months later, on March 12, 1968 on grounds that the statutes under which they are accused are vague and overbroad. The appellee sought to be restrained from continuing the proceeding is District Attorney of the county of Queens in New York.

Statutes

Eleven distinct provisions of statutes are explicitly referred to in the challenged indictment, and these are all sections of the New York Penal Law—since repealed in its entirety—that were in force and effect at the time of commission: [i] § 1897, subd. 2, prohibiting possession of loaded handguns; [ii] § 1897, subd. 3, prohibiting possession of handguns, whether loaded or not; [iii] § 1897, subd. 9, prohibiting possession of other weapons, provided there is intent to use the same unlawfully against another. For the sake of clarity, definitions of "firearm" [§1896, subd. 3], "rifle" [*id.*, subd. 11], and "shotgun" [*id.*, subd. 12] should also be read in connection with the first three provisions. Comparable provisions of the current Penal Law should also be considered for the same reason [§§ 265.05, subd. 2, 3 and 9; 265.00, subd. 3, 11 and 12]; [iv] § 160, defining criminal anarchy; [v] § 161, subd. 1, defining one method of advocating criminal anarchy; [vi] § 161, subd. 2, defining another such method; [vii] § 161, subd. 4, defining still another such method; [viii] § 163, making a misdemeanor to permit premises to be used for assemblages of anarchists. For the sake of clarity, a single provision of the current Penal Law, § 240.15, incorporates all of the provisions of the repeated statutes; [ix] § 580, subd. 1, defines conspiracy as a misdemeanor; [x] § 580-a defines the same crime as a felony; and [xi] § 223, defining arson.

The only State court pleading before the Court is the indictment. The rules governing the statement of the crime charged and the requirements for joinder of interrelated counts are set forth in the New York Code of Criminal Procedure §§ 295-b, 295-c, 295-d, 295-e, 279 and 295-g.

The only other New York statute involved is a provision of the Judiciary Law, § 596, subd. 3, since repealed.

Provisions of the Constitution invoked on this appeal are the Supremacy Clause [Art. 6], and the First and Fourteenth Amendments. Federal statutes involved are the prohibition against stays of State court proceedings [28 U.S.C. § 2283], the Civil Rights Act [42 U.S.C. § 1983], the Smith Act [18 U.S.C. § 2385], and the Declaratory Judgment Act [28 U.S.C. § 2201].

Unless these provisions are set forth in the appendix of either brief of the appellants, they are reproduced in Appendix A, *post*.

Statement of the Case

These appeals are based upon challenges to a single indictment returned by a grand jury on January 15, 1968 [Queens County No. 134—1968 (No. 813, 16-34)]. This indictment superseded a subsisting indictment [No. 1294—1967] that was found by the identical grand jury on June 20, 1967. The original indictment charged five different crimes against seventeen defendants. The superseding indictment charged the identical five crimes against fifteen of the original defendants. The original indictment contained seventeen counts, the superseding one, forty-eight counts. One reason for the modification of the original indictment relates to the counts concerning possession of guns and dangerous weapons. The original indictment contained ten counts in this respect; the superseding one, forty-one. The difference consists of the arsenal seized, pursuant to the warrants of arrest issued upon finding of

the original indictment, and the warrants of search and seizure issued at the same time by a Justice of the State Supreme Court. Another reason was that in the counts relating to overthrow of government, the original indictment omitted to specify *local* or *State* government. The superseding indictment explicitly contains such specification.

This case is all about a revolutionary action movement engaged in by appellants that collected an arsenal of weapons, explosives and incendiary devices, devised a detailed blueprint and timetable for their use, and actually used these instrumentalities in a live ammunition rehearsal held shortly before the grand jury returned its original indictment. The objective of this movement was the overthrow and paralysis of local government on and under the State level. The proximate ends of the movement were to accomplish the objective of appellants by various means:

[i] *Bombs:* These were made of thin-walled bottles filled with gasoline, rather than bottles of thicker glass used for carbonated beverages. Against police vehicles and other heavy equipment, metal pipes, either capped or squeezed at the end and containing explosives, were prepared and ready for use.

[ii] *Fuses:* These home-made igniters of the bombs consisted of:

(a) lighted cigarettes in packs of matches;

(b) rubber tubing containing black powder; and

(c) flare guns for gasoline poured in roadways and subways.

[iii] *Bazookas:* These comprised a combination of shotguns into which were inserted Molotov cocktails.

[iv] *Raw gasoline:* This was collected and ready for pouring:

(a) into roadways to prevent possible police response;

(b) into communications manholes;

(c) into subways; and

(d) into two lumberyards and a tire factory located in a carefully charted triangle.

[v] *Crude oil:* This was stored in drums and ready for pouring and ignition, according to prearranged deployment in order to prevent police response for a longer period.

[vi] *Vehicle disabling:* This included:

(a) slashing tires of police vehicles;

(b) pouring sugar into their gas tanks; and

(c) using .22 calibre rifle fire aimed at shattering windshields of police vehicles.

[vii] *Paralyzing the electric power supply:* This involved attack upon a central generating plant located in a specified area in the county of Queens.

[viii] *Guns:* These were repeatedly used at four rifle ranges and one home-made cellar range, with special emphasis on the use of the .22 calibre rifle for sniper fire, because of its diminished report and flash when employed in ambush operations against the police. Thirty-seven rifles and shotguns of various calibres were seized pursuant to search warrants, in addition to handguns, flare guns and a set of throwing knives. In addition, an arsenal of ammunition sufficient to slay 9,000 local residents was amassed (6,324 rounds, plus 32 assorted boxes and a half-dozen cans).

[ix] *Walkie-talkies for concerted action:* To maximize effective group action by appellants, walkie-talkies were acquired and their function demonstrated.

[x] *Personal weapons:* Mayhem (use of the blunt end of a hatchet against the base of the spine of the "invader" policeman), aikido (combining judo and karate against joints to facilitate bone breaking) and jiu-jitsu were systematically practiced by appellants.

[xi] *Decoy:* To prevent ordinary response of fire apparatus to conflagration set by appellants, a series of false fire alarms was contrived.

[xii] *Female revolutionary kits:* The women were provided with, and accomplished in the use of, a disguising wig and a handbag containing a bomb and fuse. The handbag was to be left in a department store. In addition, two of the appellants (Harris and Ferguson) engaged in another means to accomplish the same end by the assassination of a number of civil rights leaders. This conspiracy to murder in the first degree is the subject of a separate indictment [No. 468—1968, superseding No. 1223—1967]. The identical evidence, presented to the identical grand jury, resulted in this other indictment against two of the appellants. This indictment was tried before a Justice and jury of the Supreme Court of the State of New York, each of the two appellants was convicted and sentenced to terms of three-and-one-half to seven years' imprisonment, and on appeal their convictions were affirmed (APPENDIX B, *post*].

The evidence before the same grand jury that indicted the appellants, as well as that at the trial of two of them for conspiracy to murder, was given by an undercover police officer who had become a member of the movement. This police officer was a member of this movement from October 1, 1965 until the date of his testimony before the

grand jury, on June 20, 1967. The appellee district attorney was apprised of the foregoing evidence in April, 1967 and presented the matter to the grand jury promptly after he learned of the test run with live ammunition engaged in on June 16, 1969.

The challenged indictment in these appeals is based exclusively on the minutes of the testimonial and real evidence presented before the grand jury. Without these minutes, no valid indictment could either be found or survive. These minutes have been, and continue to be, available to the courts below, and of course to this Court.

The Indictment

The challenged indictment was found by a grand jury of twenty-two persons on June 20, 1967, and superseded by the same body on January 15, 1968 (No. 813, 16-34). It contains 48 counts (No. 580, 9a-31a).* The overwhelming number of these counts—41 in all [counts 8 through 48]—charge possession of handguns and shoulder guns in violation of the former Penal Law § 1897, subd. 2, 3 and 9. Only two of those counts relate to defendants who are not appellants in this proceeding [counts 32 and 33]. The remaining 39 counts charge eight appellants with unlawful possession of guns.

Subdivision 2 of this section makes criminal the possession of loaded handguns, without proof of intent to use unlawfully against another. This is the basis of one charge against a single appellant (Ferguson) [count 13]. Subdivision 3, of the same section, makes criminal the possession of handguns, whether loaded or not, and like subdivision 2, requires no proof of intent to use unlawfully. This subdivision is the basis of three charges against three appellants (Ellis, Harris and Samuels) [counts 8, 28 and 42].

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* References throughout in parentheses preceded by a case number are to pages in the indicated printed APPENDIX of appellants.

The remaining counts dealing with weapons—37 in all—are brought under subdivision 9 of § 1897. These relate to "other weapons" which include rifles and shotguns [§ 1896, subd. 11, 12]. These crimes specifically require proof of "intent to use the same unlawfully against another".

The unlawful intent required for indictment for these crimes has been supplied by the design of the appellants to overthrow State and local government by force and violence, as such overthrow is defined in §§ 160 and 161, subdivisions 1, 2 and 4. Eight appellants are charged in 36 counts with these crimes [counts 9-12, 14-27, 29-31, 34-48].

Six counts deal with various aspects of criminal anarchy. Two of these counts separately charge the misdemeanor of permitting different premises to be used for assemblages of anarchists against two appellants respectively (Samuels and Stewart) [counts 6 and 7]. The remaining four counts charge all appellants with advocacy of criminal anarchy (§§ 160, 161, subd. 1, 2 and 4) and the misdemeanor of conspiracy to engage in such advocacy (§§ 580, subd. 1, 161, subd. 1, 2 and 4) [counts 1-4].

These counts emphatically qualify the conduct charged as criminal as being engaged in "with the further intent that said acts be presently attempted and accomplished (No. 580, 10a, 11a, 12a, 14a)." These counts identify the target of the advocacy as "the governments of the State of New York and its various political subdivisions and agencies, * * * against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, * * *" (*Ibid.*). The means of accomplishing the overthrow is explicitly stated, "by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline" (No. 580, 10a, 11a, 12a, 13a, 14a), and "by sabotage of public transportation and communication facilities" (No. 580, 11a, 13a).

Seven overt acts are alleged in furtherance of the conspiracy to advocate under subdivision 1 of § 161, four under subdivision 2, and eight under subdivision 4 (No. 580, 14a-17a).

A final count charges conspiracy to commit arson in third degree against eight appellants and alleges five overt acts [count 5] (No. 580, 17a-18a).

The form and content of the indictment are governed by statutory procedural rules contained in New York Code of Criminal Procedure §§ 295b, 295-c, 295-d, 295-e, 279, and 295-g. These rules control not only the sufficiency of the statement of the crime but also the circumstances under which counts may be joined in a single indictment.

Summary of Argument

1. The 176 year old prohibition by Act of Congress against federal court intervention in State court proceedings begun and pending has been observed without exception by this Court. The century old Act of 1871 would constitute an exception so broad as to swallow the rule of prohibition. The instant case involves nine months of proceedings in the State tribunal initiated by almost three score applications of appellants, and offers no suitable situation for any modification of this rule.

2. Apart from prohibition, abstention is especially indicated under circumstances ruling out any "chilling effect" upon future First Amendment rights. These circumstances include repeal of the entire Penal Law prior to the finding of the indictment as well as a narrowing construction made by the highest court of the State, also before return of the indictment. No evidence of bad faith was found by the court below, and it is clear from the pending proceedings in the State court that the prosecution was instituted and conducted in good faith.

3. The indictment is aimed, not at any discussion or publication but rather at the accumulation of an arsenal for the purpose of overthrowing State and local government. The overwhelming number of counts in the indictment deal with possession of weapons. The overwhelming number of these counts require proof of unlawful intent. The unlawful intent is not predicated upon usual purpose of robbery or assault but rather overthrow of local government by force and violence. The indictment incorporates the "clear and present danger" test, and was found subsequent to a narrowing construction embodying that test by the highest court of the State.

4. The indictment explicitly charges planned use of weapons, bombs and ignited gasoline against executive officials and peace officers of State and local government, and also against transportation and other facilities both owned and operated by local government. Such activities are not likely to constitute a field preempted by the federal government.

5. A property qualification for jurors that was never observed in their selection and since repealed does not justify federal intervention by injunction or declaratory judgment in the middle of State court proceedings. This is particularly the case in the absence of any showing whatsoever of discrimination on any basis in the selection of a single juror.

POINT I

The injunctive and declaratory relief involving stay of proceedings sought by appellants is prohibited by Act of Congress in these criminal proceedings instituted in good faith and contested and pending in a State court long before application for federal court intervention.

The State criminal proceeding sought to be adjudicated by extraordinary remedy of injunction or declaratory judgment to be made by a federal district court was commenced by indictment of a grand jury of a State tribunal on June 20, 1967. Complaints in the federal district court were filed on behalf of appellants on March 12, 1968—265 days after commencement of the State criminal proceeding. During that period, each appellant pleaded twice in the State court—once to the original indictment and a second time to a superseding indictment. In addition, a total of more than 58 formal motions and applications were made in the State court by the eleven appellants as well as by six other defendants, under both the original and superseding indictments. Each of these motions and applications was disposed of by a State Supreme Court Justice.[1]

In its present form, the anti-stay of proceedings statute forbids federal court intervention in pending State court proceedings with three exceptions:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except [i] as expressly authorized by Act of Congress, or [ii] where necessary in aid of its jurisdiction, or [iii] to protect or effectuate its judgments."[2]

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[1] Brief for appellee District Attorney [Oct. Term 1968, Nos. 580, 813] Appendix B, at A12-A17 (motions collected).

[2] 28 U.S.C. § 2283 (1958).

The question raised on these appeals is whether or no another statute supplies an exception "as expressly author ized by Act of Congress," under exception [i]. No issu is presented under exceptions [ii] and [iii].

The claimed exception is contained in the three words *"suit in equity"* in this other enactment:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[3]

For 98 years, this Act of 1871 has existed side by side on on the statute books with the prohibition of 1793. Despite numerous applications to do so,[4] the Supreme Court has **never** held that the remedy of "suit in equity" constitutes an exception to the prohibition against "an injunction to stay proceedings in a State court."

The original Act of Congress—later Judicial Code § 265 —has been characterized by this Court [per Mr. Justice Brandeis] as a *prohibition:*

> "The prohibition of section 265 is against a stay of 'proceedings in any court of a State.' That term is comprehensive. It includes all steps taken or which may be taken in the State court or by its officers from the institution to the close of the final process. It ap-

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[3] 42 U.S.C. § 1983 (1958). Act of April 20, 1871, ch. 22, sec. 1, 17 Stat. 13.

[4] See *post,* notes 52-55.

lies to appellate as well as to original proceedings; and is independent of the doctrine of *res adjudicata.*"[5]

The prohibition first appeared in 1793 as an amendment to the historic Judiciary Act of 1789,[6] in these words:

"[N]or shall a writ of injunction be granted by a federal court to stay proceedings in any court of a state."[7]

The Annals of Congress, the official record of this period, merely gives the minutes of the proceedings and adds nothing to the plain meaning of the absolute prohibition contained in the statute's twenty-six words.[8]

The historic setting is generally known. Limitation upon the power of the newly created central government was part of the bargain for ratification of the Constitution. Five of the first ten Amendments were aimed directly at the federal judiciary, and imposed restrictions upon it. Deliberations of the first Congress preceding enactment of the Judiciary Act indicate that the rights of the States were of primary concern.[9] At the very moment that the third Congress was framing the Eleventh Amendment insulating States from suits in the federal courts,[10] the same Congress was also enacting the prohibition of 1793.[11] The conclusion that Congress "meant precisely that *no* injunction should be granted to stay any proceedings in State courts",[12] is fortified by the holding of this Court in the initial case before it based upon the Congressional prohibition.

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[5] *Hill* v. *Martin*, 296 U. S. 393 at 403 (1935).
[6] 1 Stat. 73, Sept. 4, 1789.
[7] 1 Stat. 334, sec. 5, March 2, 1793.
[8] Annals, 3d Cong., col. 143 (1793).
[9] Durfee & Sloss, *Federal Injunction Against Proceedings in State Courts*, 30 Mich. L. Rev. 1145, 1146 (1932).
[10] See *Chisholm* v. *Georgia*, 2 U. S. [2 Dall.], 419 (1793).
[11] Annals, 2d Cong., col. 651 (1793); 3d Cong., cols. 25, 30, 225, 477 (1794).
[12] Durfee & Sloss, *supra* note 8, at 1145-46.

In *Diggs & Keith* v. *Wolcott,*[13] an original action was brought in one State court of Connecticut to collect promissory notes, and a second action brought in another court of that State to enjoin the original action and to cancel the notes. The second action was removed to the federal court and a decree enjoining the original State court proceedings was entered. On appeal, the Supreme Court reversed on the ground that a "court of the United States had not jurisdiction to enjoin proceedings in a state court". The first decision on the prohibition[14] establishes that it was strong enough to override two separate sections of the historic parent statute that it amended: [i] the clear provision for removal of State actions to federal courts;[15] and [ii] the grant to all federal courts of power to issue specified writs, "and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdiction."[16]

In the more than 176 years of its existence, only two amendments to the Act of 1793 have been enacted, one in 1875 excepting from the prohibition an injunction authorized by any law relating to a proceeding in bankruptcy,[17] and the other, the revision of 1948 containing the three exceptions now in force and effect.[18]

For the first 80 of the 176 years of the history of the prohibition in the courts, "it was, to say the least, doubtful whether there was any exception to a literal reading of the statute. It must have become increasingly apparent that

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[13] 4 Cranch 179, 2 L. ed. 587 (1807).

[14] Although the cryptic memorandum makes no mention of the Act of 1793, the case had been regarded as based squarely on the statutory prohibition. See *Peck* v. *Jenness,* 7 How. 612 at 625 (1849).

[15] 1 Stat. 73, sec. 12, Sept. 4, 1789.

[16] *Id.,* sec. 14.

[17] Rev. Stat. § 720 (1875), Judicial Code of 1911, Act of March 3, 1911, ch. 231, § 265, 36 Stat. 1162.

[18] Act of June 25, 1948, ch. 646, 62 Stat. 968. 28 U.S.C. § 2283 (1958).

the statute seriously impaired the federal judicial power, but the courts bowed to the mandate of Congress".[19] Beginning with *French* v. *Hay*,[20] in 1874, certain exceptions to the terms of the prohibition were judicially recognized. Many of these exceptions were implied from other enactments of Congress subsequent to 1793.

In 1941, however, in *Toucey* v. *New York Life Ins. Co.*,[21] the Supreme Court in striking down one of these judicially recognized exceptions, reviewed the legislative history of the prohibition and concluded:

> "We must be scrupulous in our regard for the limits within which Congress has confined the authority of the courts of its own creation."[22]

In the 1948 revision of the prohibition containing three explicit exceptions now in force and effect, many of the exceptions judicially recognized as implicit and questioned in *Toucey* were reinstated by Congress. Thus, the "relitigation exception" fits into the third statutory exception, "to protect or effectuate its judgments", and the old "in rem" exception came under the second exception "where necessary in aid of its jurisdiction."

After the revision, the Supreme Court revisited the prohibition and its first explicit exception, "as expressly authorized by Act of Congress", in *Amalgamated Clothing Workers* v. *Richman*.[23] The Court recognized that a statutory provision could qualify as an "expressly authorized" exception, even though it contained no explicit reference to § 2283. But the Court also reversed the grant

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[19] Durfee & Sloss, *supra* note 8, at 1148.

[20] 89 U. S. [22 Wall.] 250 (1874).

[21] 314 U. S. 118 (1941). The Court recognized the validity of "statutory exceptions," *id.* at 132-34, the "in rem exception," *id.* at 134-36, but refused to recognize the "relitigation exception," *id.* at 134, and questioned *in dictum* the validity of any exception for "fraudulent state judgments." *Id.* at 136-37.

[22] *Id.* at 141.

[23] 348 U. S. 511 (1955).

of a stay of State court proceedings under provisions of a federal statute claimed as an exception to the prohibition. The Court held that the revised prohibition was not to be riddled with implied exceptions improvised by the courts and that all exceptions must be covered by one of the three explicit exceptions enacted by Congress. Said the Court [per Mr. Justice Frankfurter]:

> "By that enactment [1948 revision], Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation. * * * This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions."[24]

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[24] *Id.* at 514, 515-16. Of course, immunity of the sovereign from suit, stemming from the political doctrine that the King can do no wrong, has been transplanted as part of the American common law. See *Feres* v. *United States*, 340 U. S. 135 at 139-40 (1950). Accordingly, in *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220 (1957), the Court held in opinion [per Mr. Justice Frankfurter] that when the government of the United States seeks the injunction in its *sovereign* capacity "to prevent threatened irreparable injury to a national interest," § 2283 does not apply because "the frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone." *Id.* at 226. But when the United States is acting in a *proprietary* or private capacity, the prohibition of § 2283 does apply. *United States* v. *Bank of N. Y. & Trust Co.*, 296 U. S. 563 (1936); *Eden Memorial Park Ass'n* v. *United States*, 300 F. 2d 432 (9th Cir. 1962).

A similar implied exclusion (but not exception) to the prohibition are applications for injunctions by the government of the United States under the Emergency Price Control Act [56 Stat. 32 (1942)] and the Labor Management Relations Act [29 U.S.C. § 160 (*l*) (1964)]. Exclusive jurisdiction is vested in the Price Administration and National Labor Relations Board by these statutes to act as federal instrumentalities for enforcement of certain laws of the sovereign. To preclude power to prevent State court interference might well result in "the frustration of superior federal interests." See *Porter* v. *Dicken*, 328 U. S. 252 (1946).

On these appeals, the "expressly authorized" explicit exception to the prohibition is claimed to consist of the three words, "suit in equity" in the 98 year old statute providing for a "proper proceeding for redress" for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[25] It is abundantly clear that there is no such exception.

What do qualify are certain exceptions enacted by Congress even though no express reference is made by any citation to the historic prohibition.[26] These fall into certain clearly defined categories:

1. *Authorization to stay any State court proceedings.* When a federal statute empowers a district court expressly to (a) stay or restrain (b) any proceeding, and (c) do so in any State court, clearly such statute qualifies under the "expressly authorized" first exception to the prohibition. Thus, the federal habeas corpus act provides that the federal court before which the application is pending may "stay any proceeding against the person detained in any State court * * * for any matter involved in the habeas corpus proceeding."[27] The Interpleader Act of 1926, as amended, provides that "a district court may * * * enter its order restraining [any claimant] from instituting or prosecuting any proceeding in any State or United States court affecting * * * the interpleader action * * *."[28]

2. *Authorization to stay any court proceeding, without specific mention of a State court.* The Bankruptcy Act

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[25] Act of April 20, 1871 ch. 22, sec. 1; 17 Stat. 13. 42 U.S.C. § 1983 (1958).

[26] See *Amalgamated Clothing Workers* v. *Richman, supra* note 21.

[27] 28 U.S.C. § 2251 (1958).

[28] 28 U.S.C. § 2361 (1958). See *Holcomb* v. *Aetna Life Ins. Co.*, 228 F. 2d 75 (10th Cir. 1955), *cert. denied*, 350 U. S. 986 (1956).

provides that suits founded upon claims for which a discharge would be a release "shall be stayed until an adjudication or the dismissal of the petition."[29] The Frazier-Lemke Farm Mortgage Act provides that in cases to which it applies, a federal court "shall stay all judicial or official proceedings in any court."[30]

3. *Provision that all proceedings cease.* The Act of 1851 limiting a shipowner's liability, as amended, provides that when a shipowner deposits with the court a sum equal to the value of his interest in the vessel, "all claims and proceedings against the owner with respect to the matter in question shall cease."[31]

4. *Provision that the State court shall proceed no further.* The historic removal statute provides that after the required steps for removal to a federal court have been taken, the State court "shall proceed no further."[32]

In each of these acknowledged instances of exception from the prohibition against a stay of proceedings, the command of Congress is clear and emphatic to the effect that a stay may be granted. Although no single collocation of words is necessary for the formula of exception, it is manifest that a general reference to a suit in equity in

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[29] 11 U.S.C. § 29 (1958). The reviser's notes for the current version of § 2283, in dropping the bankruptcy exception adopted in 1875 to the Act of 1793, state that the Bankruptcy Act qualifies under the "expressly authorized" first exception to the prohibition. See H. Rep. No. 308, at A181-82 (1948).

[30] 11 U.S.C. § 203(s) (2) (1933), 47 Stat. 1473 (1933). See *Kalb* v. *Feuerstein*, 308 U. S. 433 (1940).

[31] 46 U.S.C. § 185 (1958). See *Providence & N.Y.S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578 (1883); *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118 at 133 (1941); *Beal* v. *Waltz*, 309 F. 2d 721 at 724 (5th Cir. 1962).

[32] 28 U.S.C. 1446 (e) (1958). See *Dietzch* v. *Huidekoper*, 103 U. S. 494 (1881); *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239 (1905); *Locwe* v. *Jacobs*, 243 F. 2d 432 (5th Cir. 1957).

an enumeration of remedies for redress falls far short of the clearcut authorization of termination (by stay or cessation) of "proceedings" common to all of the acknowledged exceptions.

An enactment of Congress that is harmonious and not inconsistent with the prohibition of § 2283 cannot qualify as an exception to that prohibition. A "suit in equity" is capable of being maintained without any stay of proceedings in a State court by order of a federal tribunal that is prohibited by § 2283. In the first place, a suit in equity might, consistent with the prohibition, seek redress in one or more of a baker's dozen forms of remedies[33] that do not involve either injunction or declaratory judgment. Second, a suit in equity might be maintained consistent with the prohibition, to redress a deprivation of constitutional rights, in a *State* court and seek both injunction and declaratory judgment involving a stay of *State* court proceedings, without running afoul of the prohibition of § 2283.[34]

Third, a suit in equity might be brought, consistent with the prohibition, for a federal court order in the form of injunction and declaratory judgment involving stay of State court proceedings, so long as that suit seeks federal intervention **before** institution of those proceedings. The historic prohibition concerns a federal court order to "stay proceedings **in** a State court." The Constitution is silent on the question of the power of any federal courts that Congress might create to stay State court proceedings. The progenitor of both the so-called inferior federal courts and of the limitations upon their power is Congress.[35] The most restrictive judicial construction of

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[33] *E.g.*, specific performance, accounting, cancellation and reformation of instruments, contribution, impress a trust, discovery, interpleader, ne exeat, partition, bill quia timet, sequestration and rescission.

[34] The Act of 1871 is silent on the forum for the "proper proceeding for redress." 42 U.S.C. § 1983 (1958).

[35] Const., Article III, Section 1.

the Congressional prohibition literally limited that interdict to pending State court proceedings, and treated threatened prosecutions as excluded from the scope of its coverage. In *Ex parte Young*,[36] the Court treated the unwarranted threat of proceedings as itself a wrong, akin to a trespass. The Court held that the Act of 1793 did not bar the prevention of this wrong so long as actual proceedings in the State court had not begun. Habeas corpus had been brought to secure release of a State attorney general committed to custody by federal court order for alleged contempt. The contempt arose from disobedience of a federal court order enjoining the attorney general from instituting certain criminal proceedings in a State court under a State statute. The Court held that the State statute was unconstitutional on its face and that the federal court had jurisdiction to issue an injunction under the facts of this case. "If the question of unconstitutionality with reference, at least, to the Federal Constitution be first raised in a Federal Court, that court, as we think is shown by the authorities cited hereafter, has the right to decide it, to the exclusion of all other courts."[37]

"But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a State Court."[38]

The case widely relied upon to justify federal district court intervention to stay State criminal court proceedings involving alleged deprivations of civil rights, carefully upholds the established distinction between "proceedings *in* a State court" and an application to a federal district court *at a time when no such State court proceedings are pending.* In *Dombrowski* v. *Pfister*,[39] the Court

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[36] 209 U. S. 123 (1908).

[37] *Id.* at 160.

[38] *Id.* at 162. See *Truax* v. *Raich*, 239 U. S. 33 (1915); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927).

[39] 380 U. S. 479 (1965).

ordered the "framing of a decree restraining prosecution of the pending indictments against the individual appellants".[40] As a matter of fact, there were no "pending indictments" at the time of invocation of federal district court jurisdiction.

State and local police had arrested under warrants three officials of an organization engaged in civil rights activities in various southern States since the late thirties for alleged violation of a State Subversive Activities and Communist Control Law and Communist Propaganda Control Law. The homes and offices of these officials were searched at gunpoint. The arrest warrants were quashed by a local State court because there was no probable cause for their issuance. Evidence seized at the search was suppressed by the same court on the grounds that the raids were unlawful. Upon this termination of the State criminal proceeding, investigation of the organization was continued by the Chairman of the Legislative Joint Committee on Un-American Activities [Pfister]. That Committee resolved that the organization under investigation was a "Communist front organization" on November 8, 1963, and a grand jury was convened to consider evidence against it. Before the commencement of any criminal proceeding and the return of any indictment, on November 12, 1963, suit was filed in the federal district court for declaratory and injunctive relief against threatened criminal proceedings. This relief was denied. While on appeal, the State grand jury returned indictments under the Subversive Activities and Communist Control Law against the individual appellants. The Court reversed and remanded. In doing so, the Court recognized the prohibition of the Act of Congress:

"28 U.S.C. § 2283 (1958 ed.) provides that:

'A court of the United States may not grant an injunction to stay proceedings in a State court except

[40] *Id.* at 497.

as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.'

"The District Court did not suggest that this statute denied power to issue the injunctions sought. This statute and its predecessors do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted. See Ex parte Young, 209 U. S. 123. * * * Since the grand jury was not convened and indictments were not obtained until after the filing of the complaint, which sought interlocutory as well as permanent relief, no state 'proceedings' were pending within the intendment of § 2283. To hold otherwise would mean that any threat of prosecution sufficient to justify equitable intervention would also be a 'proceeding' for § 2283. Nor are the subsequently obtained indictments 'proceedings' against which injunctive relief is precluded by § 2283. The indictments were obtained only because the District Court erroneously dismissed the complaint and dissolved the temporary restraining order issued by Judge Wisdom in aid of the jurisdiction of the District Court properly invoked by the complaint. We therefore find it unnecessary to resolve the question whether suits under 42 U.S.C. § 1983 (1958 ed.) come under the 'expressly authorized' exception to § 2283.'"[40a]

The dissenting opinion sharpens the point with the observation:

"If the state criminal prosecution were instituted first, a federal court could not enjoin the state action. 28 U.S.C. § 2283 (1958 ed.)."[41]

[40a] *Id.* at 482, n. 2.

[41] *Id.* at 499, n. 1. For cases involving First Amendment rights but not involving pending State court proceedings, see *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967).

The doctrine that any statutory exception to the prohibition in § 2283 must be inconsistent with the prohibition, has frequently been voiced. In *Moss* v. *Jones*,[42] an action was brought in a federal district court by a state prisoner alleging a deprivation of constitutional rights under the Act of 1871, at the hands of prison guards while awaiting sentence of death. Before the matter was set for trial, the prisoner sought to enjoin state officers from proceeding with his execution. The federal court refused to stay his execution "in order to accomplish one of the objectives of the * * * [Act of 1871] namely, the imposition of penalty by way of damages upon the wrongdoer[s]," since none of the three exceptions to section 2283 were satisfied.

> "There is no provision in the civil rights statute * * * which can be construed in such a manner as to alleviate what some may be inclined to term a harsh ruling. The remedy is with Congress in whose power exists remedial legislation. The two federal statutes here pertinent are clear, unambiguous, not inconsistent with each other, and do not contradict each other."[43]

In *Baines* v. *City of Danville*,[44] injunctions in a number of cases consolidated for appeal were sought under the civil rights act based upon violations of State court injunctions and the unconstitutionality of municipal ordinances concerning parades, picketing and demonstrations. The injunctions sought (a) to stay pending State criminal prosecutions and (b) to prevent future arrests. The court denied both: (*a*), on the ground that § 2283 prohibited stays for pending State proceedings, and the general equity suit provision in the civil rights act did not constitute an "Expressly authorized" exception; and (*b*) on the ground that unconstitutionality of a State statute does not con-

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[42] 288 F. 2d 342 (6th Cir. 1961), *cert. denied*, 368 U. S. 868 (1961).

[43] *Id.* at 344-45.

[44] 337 F. 2d 579 (4th Cir. 1964).

stitute grave and irreparable injury sufficient to justify federal court intervention to stay State criminal proceedings.

The opinion of the court contains the most extended analysis to date of the question whether the civil rights act constitutes an exception to the prohibition. The court examined at length "the few statutory exceptions to the anti-injunction statute * * * which were, at the least, thoroughly incompatible with a literal application of the anti-injunction statute." The court concluded:

> "In strong contrast is the Civil Rights Act. It creates a federal cause of action, but with no suggestion, explicit or implicit, that appropriate relief shall include an injunction which another Act of Congress forbids. The substantive right, in many situations, may call for equitable relief, and equitable remedies are authorized, but only by a general, jurisdictional grant. Creation of a general equity jurisdiction is in no sense antipathetic to statutory or judicially recognized limitations upon its exercise. Effective removal of a cause of action from a state court to a federal court is incompatible with further proceedings in the state court, but there is no incompatibility between a generally created equity jurisdiction and particularized limitations which restrict a chancellor's power or define the limits of his discretion. * * *.
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> "If every grant of general equity jurisdiction created an exception to the anti-injunction statute, the statute would be meaningless."[45]

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[45] *Id.* at 589. See Note, 50 Virg. L. Rev. 1404 (1964). In *Island S.S. Line* v. *Glennon*, 178 F. Supp. 292 at 295 (D. Mass. 1959), Wyzanski, D.J., in denying an injunction, said: "To read the Civil Rights Act as giving authority to enjoin a proceeding in a state court is to ignore the history and policy of the anti-injunction statute so amply reviewed in *Amalgamated Clothing Workers of America* v. *Richman Brothers, supra,* that it would be vain to retrace the ground."

As a matter of form of language, no incompatibility can be found between the Civil Rights Act and the prohibition of 1793, and the former cannot validly be asserted to be an exception to the latter. If Congress intended to authorize federal courts to stay pending State court proceedings in the Act of 1871, it would have been the simplest thing in the world to have said so in so many words in that statute. Congress had made such exception a score of years earlier in connection with the liability of shipowners,[46] and four years later by explicit amendment to the prohibition statute for bankruptcy proceedings.[47] Congress omitted to do so in the Act of 1871.

Nor can this omission be supplied by examination of the voluminous legislative history of the civil rights act.[48] Nothing can be found in the recorded debates that suggests a purpose to override the prohibited intervention by federal courts in pending State court proceedings that had been in force and effect for almost four score years.

Simple inspection of the language of § 1983, "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," plainly establishes that it cannot be an exception "expressly authorized by Act of Congress" to the prohibition against federal injunctions of pending State court proceedings contained in § 2283. On the face of the two provisions, to read the wide gamut of the totality of federally secured rights, privileges and immunities as outside the federal prohibition would make the exception swallow the rule. Such construction would obliterate the prohibition and for any conceivable practical purpose repeal § 2283 and moreover would have done so 98 years ago.

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[46] Act of March 3, 1851, ch. 43, § 4, 9 Stat. 635.

[47] See *supra* notes 17 and 29.

[48] See Cong. Globe, 42d Cong., 1st Sess., App. 67-74, 78-94, 113-17, 135-67, 178-247, 254-316 (1871).

Since *Dombrowski,* a few district courts[49] have overlooked the significant circumstance that there were no pending "proceedings in a State court" within the prohibition of § 2283 at the time of application for federal district court intervention in that case, and have ignored the explicit limitations in that respect of the opinion of the Court[50] and of the dissenting opinion.[51] Cases from such courts on the question, that have been reviewed in this Court, have respected the prohibition of Congress in civil rights cases that involve proceedings pending in State courts.

In *Cameron* v. *Johnson,*[52] State prosecutions of a clergyman leading a voter registration drive and "40 odd others" were commenced by their arrests on April 9 and 10, 1964, under the Mississippi Unlawful Picketing statute passed unanimously by the Legislature on April 8. Only three days later, on April 13, application was made in the federal district court for declaratory judgment against the statute and for injunction against prosecution pursuant to 42 U.S.C. § 1983. The district court denied relief, after considering on the merits whether the prosecution was brought in good faith, but failed to consider the constitutionality of the statute. Upon appeal, the matter was remanded by this Court to consider, among other things, whether the Act of Congress "bars a federal injunction in this case."[53] The district court on remand held that the

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[49] See *Landry* v. *Daley,* 288 F. Supp. 200 (N. D. Ill. 1968); *Younger* v. *Harris,* 281 F. Supp. 507 (C. D. Cal. 1968), prob. juris. noted, 393 U. S. 1013 (1969) [No. 4, Oct. Term, 1969]. These cases are distinguishable from others relied upon by appellants brief [(No. 11 Oct. Term, 1969) p. 24, nill] in that in the others there were 20 pending State court proceedings and no question of § 2283 could validly be raised.

[50] *Dombrowski* v. *Pfister, supra,* 380 U. S. 479 at 482, n. 2.

[51] *Id.* at 498, n. 1.

[52] 390 U. S. 611 (1968).

[53] *Cameron* v. *Johnson,* 381 U. S. 741 at 741-42 (1965).

statute in question, 28 U.S.C. § 2283, prohibited the court from enjoining or abating the criminal prosecutions instituted prior to filing the suit on April 13, 1964, and that a provision of the Civil Rights Act—42 U.S.C. § 1983—created no exception to this prohibition.[54] This Court, affirmed, noting however, that it was "unnecessary to resolve either question" with respect to the prohibitions.[55]

One appellant suggests "that declaratory relief would effect plaintiff-appellant's purpose in calling off the instant prosecution."[56] The settlement for declaratory judgment "calling off the instant prosecution" if injunctive relief is banned by Act of Congress has long been held a back door evasion of legislative policy against equitable intervention by federal courts into State court proceedings. Recent cases seeking review in this Court and involving the Civil Rights Act as an exception to the prohibition against injunction in pending State court proceedings make this point clear.

In *Brooks* v. *Briley*,[57] suit was filed in the federal district court seeking injunction and declaratory judgment on grounds of vagueness and overbreadth of certain municipal ordinances after arrest and charges in formal warrants of ten persons for disorderly conduct, carrying a dangerous weapon and inciting to riot. A three-judge panel denied relief and dismissed the suit.

On the question of the alternative relief of declaratory judgment, the Court observed:

> "Furthermore, it is clear that the prohibition under Sec. 2283 against enjoining state court proceedings

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[54] *Cameron* v. *Johnson*, 262 F. Supp. 873 at 878 (S. D. Miss. 1966).

[55] *Cameron* v. *Johnson*, 390 U. S. 611 at 613, n. 3 (1968). To the same effect, see *Brooks* v. *Briley*, 391 U. S. 361 (1968), affirming 274 F. Supp. 538 at 553 (M. D. Tenn. 1967).

[56] Appellant's Brief [No. 813, Oct. Term, 1968], at 43, n. 34.

[57] 391 U. S. 361 (1968), affirming 274 F. Supp. 538 (M. D. Tenn. 1967).

cannot be avoided by seeking a declaratory judgment H. J. Heinz Co. v. Owens, 189 F. 2d 505 (9th Cir 1951), cert. den. 342 U. S. 905, 72 S.Ct. 294, 96 L.Ed 677 (1952). The same principles of comity and federalism require that when injunctive relief is not appropriate, neither is relief appropriate under the declaratory judgment statute."[58]

In *Shaw* v. *Garrison*,[59] still another suit was filed in a federal district court, this time to enjoin prosecution of an indictment already found for conspiracy to assassinate President John F. Kennedy. The grounds for the intervention were those guidelines laid down in *Dombrowski* and *Cameron*, bad faith prosecution and violation of First Amendment rights. A three-judge federal district court denied relief in opinion:

"Plaintiff also seeks a declaratory judgment decreeing that * * * the Louisiana conspiracy statute under which he is being prosecuted, is unconstitutional. * * *

"Plaintiff relies principally upon the decision of Zwickler v. Koota, 389 U. S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967), in asserting that he is entitled to independent consideration of this portion of the complaint, regardless of our determination as to the merits of his request for injunctive relief. * * *

"However, despite the language of Zwickler, we entertain serious doubts about the appropriateness of stopping a pending state court prosecution to consider a request of plaintiff for a declaratory judgment as to the constitutionality of * * * the conspiracy statute under which he is being prosecuted. Although Zwickler stated that the doctrine of abstention could not be invoked in the circumstances of that case, it did not

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[58] 274 F. Supp. 538 at 553.

[59] 393 U. S. 220 (1968), affirming 3 Cr. L. 2352 (E. D. La. 1968) (not officially reported).

nullify the well-settled rule that the Federal Declaratory Judgment Act, 28 U.S.C. Sec. 2201, 2202, is discretionary, rather than mandatory, and declaratory relief may be withheld by the district court in its discretion in appropriate cases. * * *

"Our doubt about the propriety of giving consideration to the request for declaratory relief in the circumstances of this case is based upon our concern that by permitting a defendant to interrupt a state court prosecution to challenge the statute under which he is being prosecuted, we could open the door to constant disruption of state court criminal proceedings. * * *"[60]

There is a notion that the presence of circumstances that give rise to the invocation of equity jurisdiction—inadequacy of any remedy at law, probability of grave and irreparable injury, the chilling effect of prosecution under vague and overbroad statutes affecting First Amendment rights—somehow constitutes judge-made exceptions to the legislative prohibition against stays of State court proceedings. This notion is without foundation in the 176 year judicial history of the Act of Congress. This erroneous notion is traceable in some respects to the failure of the Supreme Court to reach the question of a legislative prohibition and to deny equitable relief on grounds that judicial requirements for equity jurisdiction had not been met.[61]

There is, of course, a double hurdle that must be surmounted to obtain a federal court order staying pending State criminal court proceedings:

(i) Establishment of ordinary judicial requirements for equity jurisdiction; *and*

(ii) A legislatively authorized exception to the prohibition of the Act of 1793.

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[60] 3 Cr. L. at 2353.

[61] *Stefanelli* v. *Minard,* 342 U. S. 111 (1951).

Surmounting one without the other can be of no avail; both must be cleared. As this Court said of the prohibition of the Act of 1793:

> "[It] would be of little force did it not apply to cases where, save for the prohibition, good ground would exist for enjoining prosecution of a pending suit."[62]

Congress undoubtedly has power under the Constitution to cut short, in the early stages, State court cases involving federal issues and subject them to federal court proceedings. Congress could, consistent with the Constitution, provide that all federal issues be disposed of in a federal court, or, that all federal issues be disposed of in a State court.[63] Between these two poles, Congress has exercised its power for stay by a federal court of matters involving federal questions pending in a State court by flatly prohibiting such intervention except in these instances.

If change is deemed desirable in these instances of exception, the question is whether change should come from the legislative or judicial branch. If from the latter, the instant cases are far from appropriate. They do not involve a race between a prosecutor to the State courthouse and a prospective defendant to the federal courthouse. Rather, these cases concern defendants in a State criminal proceeding who waited almost 9 months before making application to the federal district court. These cases involve defendants who pleaded and participated in almost three score applications and motions in writing—not to mention numerous other oral ones—thus clearly and repeatedly acknowledging the propriety of proceeding in

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[62] *Essanay Film Mfg. Co.* v. *Kane*, 258 U. S. 358 at 361 (1922).

[63] See *City of Greenwood* v. *Peacock*, 384 U. S. 808 at 833 (1966). Mackell & Ludwig, *Orderly Federal-State Court Relations* v. *Civil Disorder*, 35 Brooklyn L. Rev. 394 (1969).

the State tribunal. These cases represent defendants in a criminal proceeding who seek to switch forums when they believe that the tide has turned against them in the first tribunal. For these reasons, and the circumstances of this proceeding in the State court set forth in Point II, *post*, the legislative rule laid down 176 years ago and consistently observed by this Court ought not to be changed by judicial action in these cases.

POINT II

Apart from any prohibition by Act of Congress, the federal court in the exercise of discretion should abstain from intervening in this proceeding at this time.

If the Court decides that the Act of 1793 prohibits federal court intervention in State court proceedings instituted and pending, the decision of the district court below must be affirmed. If the Court resolves this question otherwise, then the doctrine of abstention in the exercise of discretion requires that the district court refrain from interveningg under the circumstances of this case. In *Douglas* v. *City of Jeannette*,[64] on the identical day that the court held unconstitutional on First Amendment grounds a certain municipal ordinance, it also affirmed denial of relief in an equity suit to restrain enforcement of the same ordinance in other prosecutions that were threatened. Since no State court proceedings were pending at the time of application to the federal district court, there could be no question of prohibition under the Act of 1793. The denial of relief rested solely upon the exercise of judicial discretion. Said the court:

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his al-

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[64] 319 U. S. 157 (1943).

leged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. * * * Where the threatened prosecution is by state officers for alleged violations of state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate'."[65]

(i) No chilling effect upon future exercise of First Amendment rights by appellants or anyone else could occur under the circumstances of this case.

The enforcement and prosecution of any penal statute—from "abandoning animals" to "zoning violations"—are designed to have a chilling effect, both on the actual as well as the potential offender, from engaging in conduct defined as criminal by a legislature. Penal statutes that affect the creative power of human beings must call for a "more searching judicial inquiry" as to the presumption of their constitutional validity.[66] That inquiry must be

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[65] *Id.*, at 163-64. See *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496 at 500 (1941); *Terrace* v. *Thompson*, 263 U. S. 197 at 214 (1923).

[66] *United States* v. *Carolene Products Co.*, 304 U. S. 144, footnote 4 (1938) [per Stone, J.]. See Note, 69 Columbia L. Rev. 808 at 822 (1969): "By far the greatest evidence of confusion is

undertaken in State court subject to review *after* disposition in those courts by e Supreme Court. To short-circuit this normal proce of searching judicial inquiry, there must be the kind o chilling effect that amounts to "a showing of danger o irreparable injury 'both great and immediate'," sufficie to require intervention *before* disposition in a State cour "Irreparable injury", "great" *and* "immediate" are st ngent requirements. The reasons for such stringency re self-evident: State proceedings are to be interrupt rather than concluded before federal review; federal-st e comity could readily become chaffed by permitting "t judges of the federal courts to put their brethren of the state judiciary on trial";[67] and federal review takes pla at the level of a legislatively created tribunal rather th n that of a Supreme Constitutional Court.

The entire Penal Law o the State of New York—including the sections complain about in these cases—was repealed and a new comprehsive penal law developed after long study was substitute by statute adopted on July 20, 1965.[68] The new statute w s on that date scheduled to take effect on September 1, 19 7,[69] and the new Penal Law in fact took effect on that da . By its terms, the new Penal Law governs conduct eng ed in subsequent to September 1, 1967, and the former enal Law governs conduct en-

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found in the loose assertion hat a given law is unconstitutional because it chills the exercise f a first amendment right. * * * But when the issue is whethe the law is unconstitutional, the fact that it incidentally deters s ch or association has no absolute effect."

[67] *City of Greenwood* v. *I icock*, 384 U. S. 808 at 828 (1966).

[68] II Laws of New York 965, ch. 1030, page 2343.

[69] *Id.*, ch. 1030, § 500.05, ge 2482.

gaged in prior to that date.[70] The superseding indictment, attacked in this suit, was returned on January 16, 1968—more than four and one-half months after the effective date of repeal of the provisions of the former Penal Law complained about (September 1, 1967) and almost two and one-half years after the enactment of the statute repealing these provisions (July 20, 1965). The superseding indictment concerned conduct of the appellants charged to have occurred between October 1, 1965 and June 21, 1967.[71] This conduct, of course, is governed by provisions of the former Penal Law. Clearly, there can be no effect—"chilling" or otherwise—"on free expression of prosecutions initiated and threatened" under *Dombrowski*[72] in these cases, because the statutes upon which the instant indictment was found had been repealed.

The anarchy statute before this Court died on the date of its repeal (July 20, 1965), was entombed on the date that repeal took effect (September 1, 1967), and by no stretch of the imagination can—as appellants contend—have any "inhibiting effect on the exercise of free speech [that] will operate unhindered."[73]

(ii) The prosecution was instituted and conducted in good faith in all respects.

Allegations in one complaint are that the District Attorney "issued numerous press releases and other public statements relating to the indictment and arrest of" Fernandez, and that press releases "so mixed these two separate indictments as to lead persons to believe that [Fernandez] was charged with conspiracy to commit

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[70] N. Y. Penal Law § 5.05 (1), (3), McKinney's Consol. Laws, ch. 40.

[71] Appendix No. 813 at 16-34.

[72] 380 U. S. 479 at 487 (1965).

[73] Brief [No. 11 Oct. Term 1969] at 18.

murder as well as anarchy and conspiracy to commit anarchy".[74] The other complaint alleges that "upon the arraignment of the said [appellants], the [appellee] issued numerous press releases and other public statements, relating to the indictment and arrest of the [appellants], which releases and statements were widely reported in newspapers throughout the State of New York."[75]

No finding of bad faith was made by the district court below. All questions relating to publicity were raised in the State court, and these were disposed of, with exhaustive examination of all details, by decision and opinion of the Court, *sub nom. People* v. *Kourouma*.[76] In the opinion of the Court by Shapiro, J., the facts were fully stated and the sole press release issued by the District Attorney is recited in full.

The State court concluded:

> "I am constrained, however, to observe that the district attorney did not, in that statement, violate any canon of professional ethics—which of itself has no binding effect on the courts but merely expresses a view of the legal profession (Estes v. Texas, 381 U. S. 534, 535); that the statement contained nothing more than an accurate, objective, factual report of proceedings which the district attorney had a perfect right to make and of which the public had a right to be aware, and that by no stretch of the imagination can the report, or what was said by the chief assistant district attorney on television, be deemed unfairly prejudicial to defendants."[77]

No application to review this decision was ever made by appellants, or anyone else.

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[74] Appendix No. 813 at 13.

[75] Appendix No. 580 at 4a-5a.

[76] 159 N.Y.L.J. No. 53 (March 18, 1968) pages 1, col. 3, 21, cols. 2-5, 2 Cr. L. 2490-92 (March 27, 1968) Appendix B, *post*.

[77] *Ibid.*

POINT III

The indictment further refined the definition of conduct made criminal under an already narrowly construed statute. Thus refined, the statute meets the test of constitutionality in all respects.

The indictment is aimed, not at any discussion or publication, but rather at the accumulation of an arsenal for the purpose of overthrowing State and local government.

The indictment explicitly charges the amassing of an arsenal and the steeling of a group in its use to overthrow local government. The indictment also explicitly charges the general and specific targets, the means to be used and the imminence of their use. The general targets were designated as "the governments of the State of New York and its various political subdivisions and agencies" as well as "Executive officials of said State and its various political subdivisions and agencies."[77a] The specific targets are spelled out as "publicly owned and operated transportation facilities" "public * * * communication facilities" "other facilities," and "peace officers" of the State and its subdivisions. The means to be used are specified as "by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline" as well as "by sabotage" and "by assassination of said Executive officials." Each charge relating to the use of force and violence is qualified by the necessity of proof of the requirement "with further intent that said acts be presently attempted and accomplished."[78]

The indictment brought under the former Penal Law is for a series of crimes, the overwhelming number of which concern dangerous weapons: [i] possession of weapons and dangerous instruments and appliances (§ 1897, subd. 2,

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[77a] Appendix, No. 580 at 10a, 11a, 12a, 14a.

[78] *Ibid.*

3 and 9) in 41 counts, covering six concealable pistols, revolvers, automatics and other handguns, and thirty-five rifles, double-barrel shotguns and carbines; [ii] advocacy of criminal anarchy (§§ 160, 161, subd. 1, 2 and 4) [3 counts], conspiracy to advocate criminal anarchy (§§ 580, subd. 1, 161, subd. 1, 2 and 4) [1 count] and permitting premises to be used for assemblage of anarchists (§ 163) [2 counts]; and [iii] conspiracy to commit arson (§§ 580-a, 223) [1 count]. Under both the former (§ 1897, subd. 2 and 3) and current Penal Law (§ 265.05, subd. 2 and 3), mere possession—without more—of concealable handguns is made criminal, and this covers six counts of the indictment. Under the former (§ 1897, subd. 9) and current Penal Law (§ 265.05, subd. 9), possession of rifles, shotguns and similar non-concealable weapons is made criminal only upon proof of "intent to use the same unlawfully against another", and this covers 37 counts of the indictment. The "unlawful intent" for the possession of these weapons contained in 37 counts of the indictment is not predicated upon the usual purpose of robbery or assault. Rather, the purpose is the overthrow of "the government of the State of New York and its various political subdivisions and agencies, by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished."[79]

On the face of the pleadings, this case is at once distinguishable from those that involve films, written or printed matter and speeches.[80]

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[79] *Ibid.*

[80] See, *e.g.*, *Brandenburg* v. *Ohio*, —— U. S. ——, 5 Cr. L. 3107 [dec. June 9, 1969]; *Younger* v. *Harris*, 393 U. S. 1013 (1969).

In *Presser* v. *Illinois*,[81] defendant rode on horseback with a cavalry sword at the head of a band of members of his private militia who marched armed with rifles. He was convicted for violation of a State statute requiring license by the governor for such assemblies. Among other things, Presser claimed that the State had made and enforced a law that abridged his privileges and immunities as a citizen of the United States contrary to the Fourteenth Amendment. At this early date, the Court, relying upon *United States* v. *Cruikshank*,[82] held that the First Amendment right of assembly "was an attribute of national citizenship and, as such, under protection of and guaranteed by the United States."[83] But the Court also held that a State had power to regulate or prohibit the organization, drilling and parading of military bodies or associations.

> "The exercise of this power by the States is necessary to the public peace, safety and good order. To deny the power would be to deny the right of the State to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine."[84]

In *Brandenburg* v. *Ohio*,[85] the Court made its most recent pronouncement of the test of the validity of a State statute under the First Amendment. Like *Brandenburg*, there was no refinement in the instant case of the definition of the crime by "the trial judge's instructions to the jury," simply because the appellants have sought, by the application under review, to frustrate such State court

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[81] 116 U. S. 252 (1886).

[82] 92 U. S. 542 (1876).

[83] 116 U. S. at 267.

[84] *Id.* at 268.

[85] —— U. S. ——, 5 Cr. L. 3107 [dec. June 9, 1969].

proceeding. Unlike *Brandenburg,* however, there was refinement of the statute in the indictment. In addition, there was a subsisting narrowing construction of the statute by the State court in this case, but apparently no such prior construction in *Brandenburg.* Moreover, as distinguished from the mere abstract teaching "of the moral propriety or even moral necessity for a resort to force and violence" that appeared in a television film in *Brandenburg,* the pleadings in this case indicate "preparing a group for violent action and steeling it to such action."

The question of the reality of an imminent, actual threat to the overthrow of local government by less than a score of Queens residents trained in sabotage and assassination has been answered by this Court in *Ex parte Quirin.*[86]

In that case, the Court denied habeas corpus and upheld a military commission trial of nine persons landed by two submarines of the German Government in New York and Florida. The purpose of this handful of men was "to destroy war industries and war facilities in the United States."[87]

As Mr. Justice Douglas observed in dissent in *Dennis* v. *United States:*[88]

> "If this were a case where those who claimed protection under the First Amendment were teaching * * * the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of method of terror and other seditious conduct should be beyond the pale along with obscenity and immorality."

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[86] 317 U. S. 1 (1942).

[87] *Id.* at 21.

[88] 341 U. S. 494 at 581 (1951). See *Frohwerk* v. *United States,* 249 U. S. 204 at 206 (1919); *Schenck* v. *United States,* 249 U. S. 47 at 52 (1919).

In *People* v. *Epton*,[89] the highest court of the State narrowed the construction of certain statutes relating to criminal anarchy that are charged to have been violated in the instant indictment.

> "It is clear that the proscription of mere advocacy of the violent overthrow of the Government would be an unconstitutional infringement upon free speech (*Dennis* v. *United States, supra*). The advocacy of the overthrow of the Government by force and violence must be accompanied by an intent to accomplish the overthrow (*Dennis* v. *United States, supra; Keyishian* v. *Board of Regents*, 385 U. S. 589) and there must be a 'clear and present danger' that the advocated overthrow may be attempted or accomplished (*Dennis* v. *United States, supra*)."[90]

With respect to notice of a narrower construction of the statute by a court, this Court long ago stated the familiar rule that such "interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature", and this "construction fixes the meaning of the statute", even in the very case in which the construction is made for the first time.[91] In the instant case, the conduct alleged to be criminal was charged to have been engaged in between October, 1965 and June, 1967. *Epton*—in whose case the narrow construction applicable to these cases was made—was actually arrested and charged with criminal anarchy in July 1964, tried and convicted of that crime in January, 1966 and his conviction was affirmed by an intermediate appellate court in December, 1966. The highest court of the State granted leave to appeal during the same month and reached its decision

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[89] 19 N. Y. 2d 496 (1967), *cert. denied and app. dismissed sub. nom. Epton* v. *New York*, 390 U. S. 29 (1968).

[90] *Id.* at 504-06.

[91] *Winters* v. *New York*, 333 U. S. 507 at 514 (1948).

with opinion on May 16, 1967—more than a month before the first indictment in these cases was returned.

No one sanely can doubt that the statutes challenged as overbroad in these cases certainly included the "hard core" activities embraced in this indictment, thereby giving fair warning in advance.

POINT IV

The indictment explicitly charging activities directed against "the governments of the State of New York and its various subdivisions and agencies" does not constitute State action preempted by federal legislation.

Whenever reference is made in the indictment to the overthrow of organized government, "organized government" is explicitly limited, "to wit, the governments of the State of New York and its various political subdivisions and agencies, by force and violence."[92]

The challenged statutes dealing with criminal anarchy have been restricted by the highest court of the State to "activity directed against a State or local government,"[93] and accordingly, taken with the explicitly qualified indictment, cannot directly collide with any act of Congress prohibiting sedition against the federal government, and are unlikely to enter any field chartered by Congress for exclusive occupation by the federal government.

In *Commonwealth* v. *Nelson*[94] the highest court of a State, considering a conviction under a State sedition statute, pointed out, "[W]e have not found, nor has anyone pointed to, a single word indicating a seditious act

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[92] Appendix No. 813 at 17, 18, 19, 24, 25.

[93] *People* v. *Epton*, 19 N. Y. 2d 496 at 507 (1967).

[94] 377 Pa. 58, 104 A. 2d 133 (1954).

or even utterance directed against the Government o Pennsylvania."[95] The State court reversed on the groun that the Smith Act [18 U.S.C. § 2385] superseded the en forceability of the State statute proscribing the same con duct. This Court affirmed.[96]

In *Uphaus* v. *Wyman*,[97] the Court explained its decisio in *Nelson:*

> "The basis of Nelson thus rejects the notion that i stripped the States of the right to protect themselves All the opinion proscribed was a race between federa and state prosecutors to the courthouse door. Th opinion made clear that a State could proceed with prosecutions for sedition against the State itself; that it can legitimately investigate in this area follows a fortiori * * *. Nor did our opinion in Nelson hold that the Smith Act had proscribed state activity in protec tion of itself either from actual or threatened 'sabotage or attempted violence of all kinds.' In footnote 8 of the opinion it is pointed out that the State had full power to deal with internal civil disturbances. Thus registration statutes, quo warranto proceedings as to subversive corporations, the subversive instigation of riots and a host of other subjects directly affecting state security furnish grist for the State's legislative mill."[98]

The indictment charges appellants with possession of dangerous weapons and instruments and appliances, and the planned "use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against execu-

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[95] 104 A. 2d at 139.

[96] *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956).

[97] 360 U. S. 72 (1959).

[98] *Id.* at 76-77.

tive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials.'"[99] These charges involve activities as much outside the pale of federal jurisdiction as they impose upon local law enforcement the grave obligation of the defense of the executive officials and peace officers of local government and the protection of transportation and other facilities owned and operated by local government.

So long as the States in these decisions on the Supremacy Clause observe the "clear and present danger" test, first enunciated a half-century ago in *Schenck* v. *United States*,[100] and followed by the Court in *Dennis* v. *United States*,[101] and *Yates* v. *United States*,[102] premature intervention by federal district courts cannot be justified in State criminal proceedings. Any basis for such intervention claimed under *Dombrowski* v. *Pfister*,[103] rests squarely upon rights guaranteed by the First Amendment, and not upon considerations posed by Article VI [second sentence, first clause] of the Constitution.

POINT V

A property qualification for jurors—never observed in their selection for a generation and since repealed—does not justify federal intervention by injunction or declaratory judgment in the middle of State court criminal proceedings.

In more than a century since adoption of the Fourteenth Amendment, this Court has never authorized federal court

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[99] Appendix No. 813 at 17, 18, 19, 20.

[100] 249 U. S. 47 at 72 (1919).

[101] 341 U. S. 494 (1951).

[102] 354 U. S. 298 (1957).

[103] 380 U. S. 479 (1965).

intervention in the middle of a court proceeding—federal or State, civil or criminal—on the grounds of discrimination in the selection of jurors—grand or petit.

The first claim involving rights of humans, as opposed to business corporations, in State criminal proceedings, ever to be sustained by this Court pursuant to the century old Fourteenth Amendment, concerned discrimination in selection of trial jurors under the equal protection of the laws clause. That discrimination was along racial lines and the claim was upheld a decade after adoption of the Amendment.[104]

More than a generation passed until other claims involving human rights in State criminal proceedings were to be sustained by the Court. This Court has not authorized any federal district court to stay pending State criminal proceedings on the grounds of discrimination in the selection of jurors—whether grand or petit, and whether on the basis of race, color, creed, sex or economic status. Nothing contained in the guidelines of *Dombrowski* v. *Pfister*,[105] relating to First Amendment rights, sanction district court intervention in pending State criminal proceedings on the procedural grounds of the composition of a jury.

An anachronistic provision of the statutes of New York, traceable to a century old enactment,[106] required ownership of real or personal property of the value of $250 by the prospective juror, or his or her spouse, and was repealed by statute, which became law on March 7, 1967.[107] This statute took effect on September 1, 1967,[108] and accordingly

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[104] *Strauder* v. *West Virginia*, 100 U. S. 303 (1879). See Ludwig, *Role of the Prosecutor in a Fair Trial*, 41 Minn. L. Rev. 602 at 603-05 (1958).

[105] 380 U. S. 479 (1965).

[106] Laws of New York, 1870, ch. 539, § 10, later Judiciary Law § 596, subd. 3, McKinney's Consol. Laws ch. 30.

[107] Laws of New York, 1967, ch. 49, § 1, at 68.

[108] *Id.* § 4.

did not expressly govern the impanelling of the grand jury that returned the instant indictment. However, the State official responsible for selection of jurors swears that in his "30 years experience interviewing" prospective jurors, "there has never been a single individual responding by subpoena who has been rejected solely by reason of not having the aforesaid sum, either in real or personal property. There has been, in the past, out of this huge number, perhaps a few instances where an individual might have said that he lacked the sum. But when he was asked whether he considered the value of his personal property, such as clothing, household equipment and all other types of personal possessions, it became apparent to him that he was the possessor of that amount and in each case he was accepted as a prospective juror".[109]

Absolutely nothing in any of the lengthy State court proceedings in these cases indicates selection of any grand juror on the basis of discrimination along any lines—property, sex, color, religion or race, and, accordingly the District Court below could find no such discrimination.[110]

Conclusion

The judgment of the District Court below dismissing the complaints should be affirmed in all respects.

Respectfully submitted,

THOMAS J. MACKELL
District Attorney, Queens County
Appearing pro se

FREDERICK J. LUDWIG
Chief Assistant District Attorney
Of Counsel

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[109] Appendix No. 813 at 42.

[110] 288 F. Supp. 348 at 356-57 (S.D.N.Y. 1967) (Appendix No. 813 at 68-69).

APPENDIX A

tatutes Involved

The State statu s charged to have been violated are explicitly referred t in the indictment by section and subdivision number, a well as by citation of the enacting statute. These con tute eleven sections, or subdivisions of sections—and no hers—of the former New York Penal Law, repealed effec e September 1, 1967, as follows:

[i] §1897, su 1. 2 [count 13]:

§1897. Possessi of weapons and dangerous instruments a appliances.

• • •

2. Any pers who has in his possession any firearm which is lo ded with ammunition, or who has in his possession a y firearm and, at the same time, has in his possessio a quantity of ammunition which may be used to disch ge such firearm is guilty of a felony. Such possessior hall not, except as provided in subdivision three this section, constitute a felony if such possession akes place in such person's home or place of busine

"Firearm" is de ned as follows:

§1896. Defin ons. As used in sections eighteen hundred ninety- ven, eighteen hundred ninety-eight, eighteen hundre ninety-nine, nineteen hundred, nineteen hudred one nineteen hundred two, nineteen hundred three, nine en hundred four and nineteen hundred five, the fo wing terms shall mean and include:

• • •

3. "Firearm," any pistol, revolver, sawed-off shotgun or other firearm of a size which may be concealed upon the person.

The virtually identical provisions of the current Penal Law are as follows:

§265.05 Possession of weapons and dangerous instruments and appliances

* * *

2. Any person who has in his possession any firearm which is loaded with ammunition, or who has in his possession any firearm and, at the same time, has in his possession a quantity of ammunition which may be used to discharge such firearm is guilty of a class D felony. Such possession shall not, except as provided in subdivision three of this section, constitute a felony if such possession takes place in such person's home or place of business.

§265.00 Definitions

As used in this article and in article four hundred, the following terms shall mean and include:

* * *

3. "Firearm" means any pistol, revolver, sawed-off shotgun or other firearm of a size which may be concealed upon the person.

[ii] §1897, subd. 3 [counts 8, 28 and 42]:

§1897. Possession of weapons and dangerous instruments and appliances.

* * *

3. Any person who has in his possession any firearm, gravity knife, switchblade knife, billy, blackjack,

bludgeon, metal knuckles, sandbag, sandclub or slungshot is guilty of a misdemeanor, and he is guilty of a felony if he has previously been convicted of any crime.

The virtually identical provision of the current Penal Law is as follows:

§265.05 Possession of weapons and dangerous instruments and appliances

• • •

3. Any person who has in his possession any firearm, gravity knife, switchblade knife, billy, blackjack, bludgeon, metal knuckles, sandbag, sandclub or slungshot is guilty of a class A misdemeanor, and he is guilty of a class D felony if he has previously been convicted of any crime.

[iii] §1897, subd. 9 [counts 9-12, 14-27, 29-41 and 43-48]:

§1897. Possession of weapons and dangerous instruments and appliances.

• • •

9. Any person who has in his possession any dagger, dangerous knife, dirk, razor, stiletto, imitation pistol or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another is guilty of a misdemeanor, and he is guilty of a felony if he has previously been convicted of any crime.

The weapons, rifle and shotgun, are defined as follows:

§1896. Definitions. As used in sections eighteen hundred ninety-seven, eighteen hundred ninety-eight,

eighteen hundred ninety-nine, nineteen hundred, nineteen hundred one, nineteen hundred two, nineteen hundred three, nineteen hundred four and nineteen hundred five, the following terms shall mean and include:

* * *

11. "Rifle," a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

12. "Shotgun," a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

The virtually identical provisions of the current Penal Law are as follows:

§265.05 Possession of weapons and dangerous instruments and appliances

* * *

9. Any person who has in his possession any dagger, dangerous knife, dirk, razor, stiletto, imitation pistol or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another is guilty of a **class A misdemeanor**, and he is guilty of a **class D felony** if he has previously been convicted of any crime.

Appendix A

§265.00 Definitions

As used in this article and in article four hundred, the following terms shall mean and include:

* * *

11. "Rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

12. "Shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

[iv] §160 [counts 2 and 3]:

Printed in Brief for Samuels *et al.*, at 36.

[v] §161, subd. 1 [counts 1 and 4]:

Id. at 36-37.

[vi] §161, subd. 2 [counts 2 and 4]:

Id. at 36.

[vii] §161, subd. 4 [counts 3 and 4]:

Id. at 37.

[viii] §163 [counts 6 and 7]:

Id. at 37.

The single provision of the current Penal Law, §240.15, combining these sections and subdivisions of the former Penal Law, is printed, *ante,* at 34.

[ix] §580, subd. 1 [count 4]:

Printed in Brief for Samuels *et al.,* at 37.

[x] §580-a [count 5]:

§580-a. Definition of conspiracy as a felony

If two or more persons conspire to commit the crime of murder, kidnapping, robbery in the first degree, illegally selling narcotics, arson or extortion, and if some act besides the agreement to commit such crime be done to effect the object of the agreement by one or more of such persons, each of them is guilty of a felony.

[xi] §223 [count 5]:

§223. Arson in third degree

A person who wilfully burns, or sets on fire a vessel, car, or other vehicle, or a building, structure or other erection, or who wilfully and maliciously burns or sets on fire any personal property of another person, such personal property being of a value of twenty-five dollars or over, under circumstances not amounting to arson in the first or second degree, is guilty of arson in the third degree.

Statutory procedural provisions governing the form and contents of the indictment are contained in the New York Code of Criminal Procedure, and are as follows:

§295-b. Simplified indictment, what to contain

The indictment must contain:

1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties;

2. A statement of the specific crime with which the defendant is charged.

§295-c. Statement of crime, what to contain

The statement of the crime shall contain the name of the crime, if it have one, such as treason, murder, arson, manslaughter, or the like, or if it be a misdemeanor, having no general name, such as libel, assault, or the like, a brief description of it, as is given by statute. The statement of crime may also contain a reference to the statute defining the crime.

§295-d. Form of Simplified indictment

A simplified indictment shall be signed by the district attorney, and may be substantially in the following form:

Supreme court, county of
(stating the proper county) or

County court of the county of, (stating the proper county), or court of general sessions of the county of New York.

The people of the state of New York against A. B.

The grand jury of (here insert the name of the county, or of the city, or of the city and county, in

which the indictment is found), by this indictment, accuse A. B. of the following crime:

A. B.
District attorney of the county of

§295-e. Charging crime in separate counts

The indictment must charge but one crime, except that where the acts complained of may constitute different crimes, such crimes may be charged in separate counts, and each count shall be numbered consecutively; as, for instance:

First Count:

Burglary in first degree, contrary to penal law, §402.

Second Count:

Grand larceny in first degree, contrary to penal law, §§1290, 1294.

Third Count:

Buying or receiving stolen or wrongfully acquired property, contrary to penal law, §1308.

§279. Charging crime in separate counts and consolidating indictments and informations

When there are several charges for the same act or transaction, constituting different crimes or the same crime alleged to have been committed in a different manner or by different means, or for two or more acts or transactions connected together or constituting parts of a common scheme or plan, or for two or more acts or transactions constituting crimes of the same or a similar character, instead of having several

indictments or informations, the whole may be joined in one indictment or information in separate counts, and if two or more indictments or informations are found in such cases, the court may order them to be consolidated; provided, however, that where the charges involve two or more acts of transactions constituting crimes of the same or a similar character which are neither connected together nor parts of a common scheme or plan, the court, in the interest of justice and for good cause shown, may, in its discretion, order that the different charges set forth in the indictment or information or indictments or informations, be tried separately. The joinder or consolidation of indictments or informations shall not be prevented by the fact that different penalties may be imposed for conviction upon the several crimes charged.

§295-g. When bill of particulars to be filed

Upon the arraignment of the defendant, or at any later stage of the proceedings, the court shall, at the request of the defendant, direct the district attorney to file a bill of particulars of the crime charged.

Other New York statutory provisions involved are:

Judiciary Law §596, subd. 3 [repealed by Laws of New York, 1967, ch. 49, §1]:

Printed in Brief for Samuels *et al.*, at 37-38.

Provisions of the federal Constitution and statutes involved are as follows:

Appendix A

THE CONSTITUTION OF THE UNITED STATES OF AMERICA:

ARTICLE VI.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES:

28 U.S.C. §2283:

Printed, *ante*

42 U.S.C. §1983:

Printed, *ante*

Appendix A

18 U.S.C. §2385:

Printed in Brief for Samuels *et al.*, at 38.

28 U.S.C. §2201:

Creation of remedy.—In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

APPENDIX B

Decision and Opinion of the Appellate Division of the Supreme Court, State of New York, Second Department, on Appeal From Judgments of Conviction of Two Appellants Herein.

[Reported in 32 A D 2d 936, —— N.Y.S. 2d ——, dec. July 7, 1969].

11 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. HERMAN BENJAMIN FERGUSON and ARTHUR HARRIS, Appellants.— Appeals from two judgments (each as to a respective defendant) of the Supreme Court, Queens County, both rendered October 3, 1968, convicting defendants of conspiracy to commit murder in the first degree, upon a jury verdict, and imposing sentence. Judgments affirmed. Defendants were convicted of conspiracy to murder civil rights leaders Roy Wilkins and Whitney Young, after trial in June of 1968. They claim several bases for reversal, all of which have been unanimously rejected by this court, except for the claim that the Criminal Term should have granted a mistrial and an adjournment of the trial until the fall of 1968 on the ground that the emotional impact of the assassination of Senator Robert Kennedy

during the trial rendered it impossible for defendants to get a fair trial. We reject this claim and, in this respect, we disagree with the minority. There is no disagreement on the part of the members of this court as to the admissibility of the testimony that Robert Kennedy's name was included on the assassination list. Roy Wilkins and Whitney Young were but two of other intended victims of an overall conspiracy to eliminate certain civil rights leaders, black or white, whose activities and philosophies posed a threat to the success of the black revolution. The evidence of the broader conspiracy bore on the motivation of the specific conspiracy with which defendants were charged and for which they were on trial. Accordingly, the names of others including President Lyndon B. Johnson and Senator Robert Kennedy came to light as prospective victims. On all the facts and circumstances, we are of the opinion that the trial court properly rejected defendants' requests for a mistrial and an adjournment of trial. The identity of Robert Kennedy's assassin was immediately known and widely publicized. Defendants were on trial at the time of the occurrence and far removed from the scene. It is understandably not urged by defendants that they were in any manner identifiable with the Kennedy assassination despite the happenstance that his name was included on a list of their prospective victims; and nothing has been offered to show that the carefully selected jurors, all sworn to perform their duty, made such a connection on their own. The trial court's forceful charge clearly instructed the jurors that they were not to be so inclined. Moreover, in view of the admissibility of the testimony that Robert Kennedy's name was included on the list, such testimony, if it were to militate against defendants, would continue to do so irrespective of when defendants were tried. The only prejudicial significance which could be deemed attributable to the assassination and the only significance which the minority attribute thereto is its emotional impact on the triers of the fact. As such, it can only be evaluated for its emotional impact as an assassination per se irrespective of whether the victim was Robert Kennedy or any other public figure of similar stature. The incident in this context was not more significant than the never-to-be-forgotten assassinations of President John F. Kennedy and Dr. Martin Luther King. Nor, in view of the constant ceremonial public reminders of the latter assassinations can it be persuasively urged that those assassinations were so far removed from that of Robert Kennedy, whose philosophies were closely identifiable with his late brother and Dr. King, as to attenuate the jury's continued awareness of the assassinations of the President and Dr. King and render them significantly less prejudicial than the Robert Kennedy assassination. It is our view that the emotional impact of the Robert Kennedy assassination, being closer in point of time, could not be readily disregarded and should not, in any event, be underestimated. Nevertheless, it is incumbent upon the court, in the interests of justice, on behalf of the People as well as the defendants, to make a realistic appraisal of the emotional impact of these incidents of violence on jurors. To attribute to the Robert Kennedy assassination such significance as to justify a conclusion that a mistrial should have been declared, when, at the posture at which the incident became fatal and the emotional impact became significant, the People's case, which included the testimony of an "unmasked" undercover agent, had already been substantially completed, is to strain the interests of justice to a filament, in disregard of the People's right to its share of justice. We hold (1) that no substantial constructive purpose would have been served in declaring a mistrial and adjourning the trial until the fall; (2) that it is unrealistic to say that the trial court should have anticipated that at an adjourned date any substantial attenuation of the emotional impact of the Robert Kennedy assassination could have been achieved; (3) that to effect any significant constructive adjournment in this

as well as in similar cases would require waiting for a period when there will be a hiatus of violence, which would be tantamount to declaring a moratorium on all prosecutions for similar acts of violence; (4) that the suspension of the trial over the three-day weekend following the Senator's death accomplished as much in the way of reducing any possible prejudice as a more prolonged adjournment would have accomplished; and (5) that to reason that an act of violence such as the Robert Kennedy assassination was of such prejudicial emotional significance as to render a fair trial at bar impossible is, if carried to a logical conclusion, to justify an indefinite postponement and would result in the frustration of the effective administration of justice because subsequent widely publicized acts of violence could then render the perpetrators of prior similar acts practically immune from prosecution. It is therefore in this totality of circumstances that we resist reversal under the guise of serving the interests of justice. We conclude that the situation at bar calls for an affirmance of the judgments of conviction. Christ, Acting P. J., Munder and Kleinfeld, JJ., concur; Benjamin and Martuscello, JJ., dissent and vote to reverse the judgments and grant a new trial, with the following memorandum: Defendants, allegedly leaders of a black revolutionary movement known as RAM, were convicted of conspiracy to murder two black civil rights leaders (Roy Wilkins and Whitney Young) because they considered them "Uncle Toms" who had sold out their fellow blacks to the white society and because they (defendants) believed that these murders would facilitate the success of the black revolution. The People likewise intended to show, and did show, over defendants' objection, that defendants intended to kill Robert Kennedy, as well as Roy Wilkins and Whitney Young. The trial started on June 3, 1968. During the early morning of June 5, Senator Robert Kennedy was shot by Sirhan Sirhan. At first it was not known whether the wound was fatal. When court convened on June 5, defense counsel moved for a mistrial and an adjournment of the trial until the fall, on the ground that the shooting of Senator Kennedy had created an emotional atmosphere in which it was impossible for the jurors to accord defendants a fair trial on the indictment charging them with conspiracy to assassinate prominent men. The motion was denied and the trial continued. Later that day proof was adduced, over defense counsel's objection, that a prior list of people to be assassinated by RAM included Senator Robert Kennedy. Again, defense counsel moved for a mistrial, stating that Senator Kennedy was then close to death and the emotional atmosphere resulting from his shooting was so prejudicial to defendants that they could not possibly get a fair trial; and again the motion was denied. Senator Kennedy died on the next day (Thursday, June 6) before court convened. At the opening of court, the Trial Justice announced that at the close of the day the court would recess until Monday morning. While he did not refer to the Kennedy assassination, it was by then common knowledge that all courts and schools were scheduled to be closed on Friday out of respect for Senator Kennedy's memory; that his body would lie in state at St. Patrick's Cathedral on Friday before being taken to Arlington National Cemetery on Saturday to be buried near his late brother, President John F. Kennedy; and that Sunday had been set by the Government as an official day of mourning. And, of course, everyone knew that these events would be the subject of massive television, radio and press coverage throughout the entire weekend. When court recessed until Monday morning defense counsel once again moved for a mistrial, pointing out that under these conditions it would be impossible for the jurors to remain objective, despite the court's instructions that they were not to watch television or read newspapers and despite their own most conscientious efforts to wipe from their minds the tragic assassination of Senator Kennedy. And once again the court refused to grant

Appendix B.

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a mistrial. In our opinion it was seriously prejudicial error not to grant a mistrial and not to adjourn this trial until the fall. The shocking emotional impact of Senator Kennedy's assassination, the dramatic funeral service and the public mourning for his tragic end — all occurring while defendants were on trial for conspiring to assassinate two other prominent public figures — inevitably must have prejudiced the jurors against these defendants, particularly since Senator Kennedy himself was one of those originally marked for assassination by them. No man could have resisted these emotional pressures and remained objective, no matter how sincere his wish to do so. No human jury could have given these defendants an impartial trial in the midst of these events. And under our system of law that is what these defendants were entitled to, whether they be guilty or innocent. An adjournment of several months would have allowed passions to cool and emotions to subside. By then the assassination of Senator Kennedy would have become history, not a tragedy still on the boards and unfinished. By then it would have been possible to accord these defendants a fair and impartial trial, uninfluenced by the still-aroused, deep-seated passions and emotions that inevitably pervaded the trial these defendants had. We vote to reverse and grant a new trial.

APPENDIX C

Digest of Opinion of Shapiro, J., Supreme Court, State of New York.

[Not officially reported; 2 Crim. L. Rep. 2490; 159 N.Y.L.J. No. 59, at p. 21, col. 3 (1968)]. A17

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NY DA NOT PUNISHABLE FOR PRESS RELEASE, TV TALK ABOUT INDICTMENT

Court's oral pretrial order to refrain from publicity about case won't support contempt charge.

An "accurate, objective, factual report" made by a New York District Attorney's office to the press about the reindictment of a group of controversial defendants charged with anarchy, arson, possession of weapons, and conspiracy to murder less militant civil rights leaders, the New York Supreme Court, Queens County decides, neither constituted contempt of an oral pretrial order that the DA refrain from publicity about the case nor violated Canon 20. (People v. Kourouma, 3/17/68)

Digest of Opinion: "The predicate of this application to punish the District Attorney of Queens County as and for a criminal contempt of court is the claim that the District Attorney, in issuing a press release on January 17, 1968, upon the filing of and the arraignment of the defendants under Indictment No. 134/68, and a statement made by the Chief Assistant District Attorney on a television news broadcast later that day, violated an oral direction of the court made on June 23, 1967, that the District Attorney refrain from making any statements regarding crimes charged in Indictment No. 1224/67, charging seventeen defendants (sixteen of whom are now defendants under a superseding Indictment No. 134/68) with advocacy of criminal anarchy, conspiracy to commit that crime, conspiracy to commit arson and a number of substantive counts of illegal possession of weapons. The threshold question here is whether a court has the power in a matter pending before it to order a district attorney or any other person not to make any statement of any kind regarding the case to the news media. This, in turn, involves the ever-present collision, in such a situation, between the fundamental constitutional rights of free speech and press and a litigant's right to a fair trial. The resolution of the extent of the exercise of these sometimes conflicting rights requires the exercise of independent constitutional judgment (see Sheppard v. Maxwell, 304 U.S. 333, 36[illegible]; Pennekamp v. Florida, 32[illegible] U.S. 331, 335). • • •

"On June 23, 1967, when applications by a number of the defendants were being heard by the court, the oral directive or order which defendants claim was violated by the district attorney was made. The precise nature of that directive and the context in which it was issued is made apparent by a short quotation from the proceedings.

"Mr. Spitz: I would like to ask this Court to direct the District Attorney's Office to make no further public statements, to hold no further press conferences, not to appear on television, on radio, or hold public press conferences concerning this case.

"When I left this courtroom on Wednsday, • • • I left this courtroom, got into my car, turned on the radio and heard the District Attorney of this county give a one-half hour interview on C.B.S. in which comments on matters of evidence which may or may not be admissible upon a trial of this action.

"Subsequently, the District Attorney was seen on television. As a result of the actions of the District Attorney's office in my opinion without parallel in this county, or maybe even without parallel in the City of New York, has been thrown around these defendants, and has already, in my opinion, deprived them of any possibility of getting a fair trial in this jurisdiction. (Applause in the courtroom.)

"The court: There will be no applauding in the courtroom. You can listen here, and if you don't behave, I'll order this courtroom cleared. I'll have no more of that. Everyone will have opportunity to talk. You are not in a theatre.

"Now, Mr. Spitz, of course, I have no control as to what the District Attorney, or anyone else, does, and of course, you can make the proper motions at the proper time. If you want to make a motion for a change of venue, you may recite all of those incidents and the motion will be considered by the Judge before whom you bring it.

"Mr. Spitz: If your Honor please, you have control over an officer of the court. The District Attorney is an officer of the court. What I am saying here is this — under the recent decisions of the courts, and the United States Supreme Court —

"The court: (Interrupting) May I interrupt, Mr. Spitz. All I can say to the District Attorney, or anyone that has issued any of these statements, is to stop it — if they've done it.

"Mr. Spitz: That's what I am asking your Honor to do. We can't repair the past, but we can prevent it in the future.

"The court: I understand that, and that's why I said you can make your proper motion. If you want a change of venue.

"Mr. Spitz: At this point I don't ask your Honor for a change of venue.

"The court: I know. I've already said to Mr. Ludwig, and he can tell the District Attorney, not to do it. As far as I direct that, they are to refrain —

"Mr. Spitz: (Interrupting) Thank you very much.

"The court: — from any such publicity.

"Mr. Ludwig: May I point out, your Honor —

"The court: (Interrupting) No, that's it, Mr. Ludwig." • • •

"Demurrers interposed by a number of defendants were sustained by me as to certain counts of the indictment then pending. A few days thereafter, and on January 17, 1968, Indictment No. 134-68, which supersedes Indictment No. 1224-67, was returned, and on the same day the defendants were arraigned thereunder. Except for a greater number of counts and the correction of pleading errors and omissions which caused the sustaining of the demurrers, this indictment charged defendants with essentially the same crimes they were charged with in the prior indictment. Shortly after the arraignment, the District Attorney's Office issued the press release which is the progenitor of this motion. That release reads as follows:

'Queens District Attorney Thomas J. Mackell announced this morning the rearraignment in Supreme Court, Criminal Term, of fifteen defendants in the so-called Revolutionary Action Movement case on a fresh indictment. The new indictment, found by the grand jury on January 15, 1968, contains forty-eight counts charging five different crimes against fifteen defendants. The new indictment supersedes one of two indictments found by the identical grand jury on June 20, 1967. The original indictment, now superseded, contained seventeen counts of the same five crimes against seventeen defendants.'

"The principal modifications of the original indictment, and the reasons for making them, were briefly summarized by District Attorney Mackell:

"'(1) The new indictment contains forty-one counts for possession of dangerous instruments and appliances. These

counts cover possession of a half-dozen concealable pistols, revolvers, automatics and other hand guns; by five of the defendants (Ellis, Ferguson, Harris, Samuels and Stewart). In addition, possession of thirty-five rifles, double-barrel shotguns and carbines are also charged to these five defendants and an additional five (Haynes, Kourouma, McPherson, Rookard and Taylor). Two of these defendants are charged in the fresh indictment with respective possession of fifteen (Ferguson) and seven guns (Rookard).

"Under the former indictment, there were but ten counts instead of forty-one, and these were charged against seven of the defendants instead of ten of them.

"The reason for the increase in the number of charges and defendants with respect to weapons is based upon events subsequent to the finding of the original indictment.

"(2) Apart from weapons, the original indictment charged commission of the crimes of advocacy of criminal anarchy (one count), conspiracy to advocate criminal anarchy (one count), conspiracy to commit arson (1 count) and permitting premises to be used for assemblages and anarchists (2 counts). The superseding indictment continues all of these charges, but divides the charge of advocacy of criminal anarchy into three counts, instead of one.

'In addition, in the new indictment, the anarchy conspiracy, nineteen overt acts are set forth, instead of nine in the old indictment; and for the arson conspiracy count, five overt acts instead of four are set forth.

'The other original indictment found by the grand jury on June 20, 1967, against two defendants for conspiracy to commit murder remains undisturbed.

'A further indictment found by another grand jury against Max Stanford, one of the defendants, was handed up for the crime of assault, second degree, committed against a Department of Correction Officer.'

"The second basis for this motion rests on a statement made by the chief assistant district attorney on a news broadcast on the same day that the release was issued. The movants accuse the prosecution of misleading this court by asserting upon the oral argument that the appearance of the assistant on television was not for the purpose of discussing this case but for the purpose of discussing generally the problems of free press and fair trial, whereas a transcript of that broadcast demonstrates that statements were made relative to this case. In support of this condemnation of the prosecutor, the following portion of the broadcast transcript is quoted in defense counsel's affidavit:

'Ludwig: No political move whatsoever; a non-political Grand Jury consisting of 23 people, a cross-section of the community of Queens, on Monday evening saw fit to find a superseding indictment. One of the reasons for the superseding indictment was to add a great number of counts, 31 to be specific, with respect to weapons that were found subsequent to the last indictment returned by them. That is the reason for this new indictment.

'Borgen: It's a larger indictment, it contains 48 counts. The first indictment that it supersedes contained only 17.

'Jensen: Frederik Ludwig, Assistant District Attorney, Queens.'

The unexpurgated transcript, however, reads as follows:

"Jensen: In Queens today 17 members of a group called the Revolutionary Action Movement, or RAM, were rearraigned on a new 41-count indictment which included charges of criminal anarchy, arson, possession of weapons and plotting to commit murder. The new charges supersede a previous 17-count indictment handed up last summer which was later dismissed. After the court action, the lawyer for some of the defendants, Conrad Lynn, charged that his clients could not get a fair trial in Queens.

'Lynn: It is clear that Mackell, the District Attorney, is continuing with his political vendetta against the black community in Queens. This is never mentioned by the press. It's always these charges against these 17 * * * individuals who've never been found by any tribunal to belong to any organization at all. They're constantly smeared in the press as if they belonged to some secret organization dedicated to the overthrow of the government and this is constantly reiterated in the press, in the radio, in TV. These people have never been given the opportunity for a trial. There has been no trial but they have been condemned in the press and in public opinion.

'Jensen: The charges made by Attorney Conrad Lynn were referred by Chris Borgen to Queens Assistant District Attorney Frederick Ludwig. Borgen asked him if the new indictment was a political move.

'Ludwig: No political move whatsoever; a non-political Grand Jury consisting of 23 people, a cross-section of the community in Queens, on Monday evening saw fit to find a superseding indictment. One of the reasons for the superseding indictment was to add a great number of counts, 31 to be specific, with respect to weapons that were found subsequent to the last indictment returned by them. That is the reason for this new indictment.' * * *

"Thus, at the outset, the question presented is whether the direction of the court on June 23, 1967, to the district attorney not to issue any statements was a 'lawful mandate,' the disobedience of which would support a finding of contempt, for it is * * * disobedience only to mandates of the court given in accordance with law [which] are subject to such punishment' (Spector v. Allen, 281 N.Y. 251, 259). Punishment for criminal contempt being a most drastic remedy, 'the mandate must be clear before disobedience can subject a person to such punishment' (Spector v. Allen, supra, at p. 259).

"I have no doubt that in directing the district attorney not to make any statements, the court did so out of a sense of caution aimed at preserving defendants' right to a fair trial from invasion by the dissemination of what counsel who made the request for such direction described in general terms as prejudicial publicity. Commendable as the motive for the direction was, I find that the order in the context of the fact situation was not a 'lawful mandate,' for it impinged upon the constitutional right of freedom of expression and discussion guaranteed by the First Amendment of the United States Constitution. * * *

"Since I have held that the order of the court upon which this proceeding is based was not a 'lawful mandate', there is no reason to assay the nature of the statement by the district attorney complained of in this proceeding. I am constrained, however, to observe that the district attorney did not, in that statement, violate any canon of professional ethics — which of itself has no binding effect on the courts but merely expresses a view of the legal profession (Estes v. Texas, 381 U.S. 534, 535); that the statement contained nothing more than an accurate objective, factual report of proceedings which the district attorney had a perfect right to make and of which the public had a right to be aware, and that by no stretch of the imagination can the report, or what was said by the chief assistant district attorney on television, be deemed unfairly prejudicial to defendants." — Shapiro, J.

(People v. Kourouma; NY SupCt Queens Cty, 3/17/68)